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CURRENT EVENTS.

CRIMINAL LAW REFORM.—A newspaper article has lately attracted our attention, in which the writer, after citing a recent case in which a prosecution failed by reason of a defective indictment, is led into a train of reminiscences of numerous similar cases in which guilty defendants went "unwhipt of justice," because, of what he denominates, the "technicalities of the law." No doubt like cases are constantly occurring in every part of the country, and this fact, together with the popular feeling that the administration of the law is uncertain and dilatory, fosters and keeps alive the tendency in many sections to lynch law.

The question at once arises, what is the remedy for the uncertainty of justice which grows out of the technicality of the law? How can it be so arranged that, when a prisoner has been indicted for a heinous crime, tried, convicted, and has appealed, he shall not escape, because, in the initial pleading—the indictment—there appears a flaw that abrogates the whole proceeding, and if it does not set him free at once, compels the prosecution to begin *de novo* with infinitely less hope of success than at first, when the matter was fresh, the witnesses all well in hand, and all the circumstances were favorable to conviction? Of course, everybody looks to the legislature. The law, they say, must be simplified; these cast-iron rules must be abrogated; common sense must supercede technicality. If, however, we will look into the criminal codes of most of the States, we will find that they have already gone very far in that direction. The Missouri statute, for example,[1] condones almost every conceivable blunder which a court or a prosecuting attorney could reasonably be expected to commit. The legislature, of course, should do its share, examine carefully the existing law, and apply appropriate remedies to such defects as they may discover, taking care, however, that in stopping a small leakage, do not open a larger one. Strange, as it may seem, there is a limit to safe generalization and simplification. Unexpected results sometimes confront the bold innovator. For example, the ludicrous blunder of the California codifiers, who so simplified the law on the subject of bigamy, that in that State a man lived, and, for aught we know still lives, with two *lawful* wives.

Although the legislature should do what it can, the true remedy for this evil, in our opinion, can only be found in greater care in the trial courts. The indictments should be carefully scrutinized as soon as they are returned by the grand jury, and, as far as possible, all technical questions should be settled *in limine*, and the rules of practice should be so modified as to accomplish this purpose.

The fragility of indictments is a matter for special wonder—in fact, a professional phenomenon. The gentlemen who prepare these instruments are specialists—experts; for years they are wholly addicted to practice in criminal causes. They have, as to all common law crimes, the precedents of a thousand years, carefully annotated, classified, and labeled by numerous text-writers. As to offenses, created and defined by statute, they have the statute itself, and the rule that it is always safe to follow the terms of the statute. They are relieved of many chances of error by the statutes of *jeofails*, usually broad, sweeping, and indulgent in the highest degree; and yet hardly a week passes in which we do not hear of an important case in which an indictment is quashed. The ingenuity of the counsel for the defense finds a flaw, a fissure, "not as deep as a well nor as wide as a church door, but it will serve;" it suffices to compel the quashing of the indictment. Then the case must needs "go over" to next term, and the prosecution begins *de novo*, and in the *interim* witnesses die, or are spirited away, and papers disappear, and, in short, the prosecution fails. And the strangest thing of all is that, in the profession and out of it, a failure of justice from this cause is regarded as a visitation of Providence, an act of God, in the nature of a tornado. an earthquake or a tidal wave. In ante-railroad times, the tolerant newspapers of that generation had a stereotyped phrase,

[1] Rev. Stat. (1879) § 1821.

brought into use whenever they chronicled the upsetting of a mail-coach: "No blame is attached to the driver."

NOTES OF RECENT DECISIONS.

CHATTEL MORTGAGE—LANDLORD AND TENANT—LANDLORD'S LIEN UNDER LEASE—VOLUNTARY ASSIGNMENT — RIGHTS OF ASSIGNEE—FRAUD.—In a recent case in the New York Court of Appeals[1] the court held that a lien for rent, created by lease of a store, for a term of five years upon the stock in trade, of the lessee, which he was permitted by the terms of the instrument to sell at retail and replenish from time to time, was fraudulent and void upon its face, and was of no effect as against the assignee of the lessee, who had made a general assignment, for the benefit of his creditors, with preferences however, which would absorb the whole of the proceeds of the stock in trade.

The court said that the lien was good as between the parties to the lease,[2] not only as to the property in the possession of the lessee at the time of the execution of the instrument, but also as to subsequently acquired property.[2] The court seems to concede that, in the absence of statute, the assignee in a voluntary assignment had no higher or better rights than his assignor, but that when, as in this case, he represents creditors he may well treat as void all agreements made in fraud of their rights, and that his powers in this respect are, under the New York statute, even greater than those of the creditor himself who can only proceed against his debtor's property, covered by a fraudulent lien, after he has obtained a judgment and issued an execution.[3]

The court further held, that although the lease did not purport to convey the title to the property, it was, nevertheless, a chattel mortgage, and as such subject to the statutory provision for the filing of such instruments. And thus the attempt of the lessor to establish a secret trust in the goods in favor of the lessor was defeated.

[1] Reynolds v. Ellis, October 5, 1886; 7 East. Rep. 342.

[2] McCaffray v. Woodin, 65 N. Y. 459; s. c., 22 Am. Rep. 644; Wisner v. Ocumpaugh, 71 N. Y. 113.

[3] Southard v. Benner, 72 N. Y. 424.

In some of the States there have been different rulings. In Rhode Island, for example,[4] it has been held that an unrecorded mortgage of personalty was good against an assignee for the benefit of creditors, because the assignee could have no better right than the assignor, and the mortgage was good between the parties who executed it. In Kentucky, in a recent case,[5] the Court of Appeals says, that an assignee for the benefit of creditors generally "is a purchaser for value; that he stands in the shoes of the debtor his assignor, and can assert no equity that the debtor himself could not assert." * * * * The Supreme Court of Nebraska has held that, in case of a voluntary assignment for the benefit of creditors, the assignee represents the assignor and can make no defense that his assignor could not make.[6] And in Missouri, it is held that the assignee, under a voluntary assignment, does not represent the creditors, and cannot on their behalf dispute a conveyance of his assignor's goods *inter partes* as being in fraud of creditors.[7] So in Pennsylvania, in an old case,[8] it is said: "The assignee is the debtor's instrument for distribution. * * * As he stands in no privity to the creditors, he cannot arrogate to himself any of their powers or rights."

A manifest distinction exists, and should be borne in mind, between a voluntary assignment, and one made under the operation of a bankrupt or insolvency law. In the first the assignee is the creature of the assignor; in the latter he is the officer of the law. To the first the reasoning of the foregoing rulings very clearly apply; to the latter they are wholly inappliable. The assignee in a voluntary assignment executes the orders of the assignor as expressed in the assignment; the statutory assignee is the trustee of the law, and acts for the creditors in accordance with the provisions of the statute.

The distinction between these two classes

[4] Wilson v. Esten, 14 R. I. 621; Williams v. Winsor, 12 R. I. 9; Gardner v. Commercial Nat. Bank, 13 R. I. 155.

[5] Bridgford v. Barbour, 80 Ky. 529, 534, 535.

[6] Hensel v. Cremer, 13 Neb. 298. See also Pillsberry v. Kingon, 31 N. J. Eq. 619.

[7] Heinrich v. Wood, 7 Mo. App. 236; Schultz v. Chrisman, 6 Mo. App. 338; State use, etc. v. Rowse, 49 Mo. 593; Gates v. Labaume, 19 Mo. 17.

[8] Vandyke v. Christ, 7 Watts & S. 374.

of assignees is obliterated in New York by the act of 1858, ch. 314, which provides: § 1. "That any executor, * * * assignee, or other trustee of an estate, or the property and effects of an insolvent estate * * * may, for the benefit of creditors, * * * * disaffirm, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor," etc. This statute, according to the ruling in the case under consideration, abrogates the distinction between the voluntary and the statutory assignee, divests the former of his character as agent and instrument of his assignor, makes him the trustee for the creditors, and confers upon him all the powers exercised by an assignee in bankruptcy, or one who holds that office under the insolvent laws of a State.

NAMES OF CORPORATIONS.

Must Have Name.—It is somewhat difficult for one to think of a corporation without a name, and one author has said: "The names of corporations are given of necessity; for the name is, as it were, the very being of the constitution; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name."[1] Coke likens its name to an individual's proper or baptismal name, and when bestowed by a private founder he compares him to a god-father.[2] This is not strictly correct, for a change of a letter in a name may make it entirely another name, while a change of a word, or even more, may not make any essential difference in their sense,[3] as we shall hereafter see.

May Have More Than One Name.—A corporation may have more than one name. Thus, though incorporated by one name it may be authorized to sue in another.[4] So in an old case, where the college of physicians were incorporated by the name of the president, college or commonalty of the faculty of physic, and afterward in the king's patent it was granted that the president of the college should sue and be sued in behalf of the college, it was held that an action could be brought in either name.[5] But this case is somewhat shaken by two others, in which it is declared that a corporation may not have two names for the same purpose.[6] In view, however, of the absolute power of the legislature, it is undoubtedly competent for it to authorize corporations to have two or more names for the same purpose.[7]

May Acquire More Than One Name by Usage.—So a corporation may acquire a second or other names by prescription or usage.[8] Thus, one court said: "We know not why a corporation may not be known in its public proceedings by several names, as well as individuals."[9] And this is true of a municipal corporation.[10]

Who Bestows the Name.—Until recently the king in England, in granting his patent, usually designated the name by which the corporation was to be known, or else the recitations in it were such as to indicate what it should be known by;[11] and the same was true of charters granted by parliament.[12] And in this country it is said that the recitation in the act of incorporation may be such as to indicate the name by which the corporation shall be known.[13] Under the municipal corporations act of England, provisions are made for the name of a city or borough, and the style in which it shall sue and be sued; and such a borough is now known as the

[1] 2 Bac. Abr. 440 (Amer. ed.); see Smith's Merc. Laws, 133.

[2] 10 Co. 28; 2 Inst. 666.

[3] Newport Mechanics Manf. Co. v. Starbird, 10 N. H. 123.

[4] College of Physicians and Butler, Jones 261; s. c., Lit. 168, 212, 350; Cro. Car. 256.

[5] College of Physicians v. Salmon, 5 Mod. 327; 2 Salk, 451; Ld. Raym. 630.

[6] Anon., 3 Salk. 102; Attorney-General v. Farnham, Hardres, 504.

[7] 1 Kyd. Cor. 230.

[8] Willcock on Mun. Cor., 34; Mayor of Carlisle v. Blamire, 8 East. 487; Gifford v. Rockett, 121 Mass. 431; s. c., 7 Amer. Cor. Cas. 462.

[9] Minot v. Curtis, 7 Mass. 441.

[10] Clement v. City of Lathrop, 5 Amer. Eng. Cor. Cas. 563. See generally, Dutch West India Co. v. Moses, 1 Stra. 614; Knight v. Mayor of Wells, 1 Ld. Raym. 80; Smith v. Plank Road Co., 30 Ala. 650; South District v. Blakeslee, 13 Conn. 227; Melledge v. Boston Iron Co., 5 Cush. 158.

[11] 2 Bac. Abr., 441, citing 1 Salk. 191, p. 3.

[12] Glover Cor. 52, 53; Willcox Cor. 35; Grant Cor. 50.

[13] Trustees v. Park, 1 Fairf. (Me.) 441; School Com. v. Dean, 2 Stew. & Port. 190.

"mayor, alderman and burgesses of the borough of ——," and a city as the "mayor, alderman, and citizens of the city of ——."[14]

Failure to Name.—If the incorporating act or instrument should contain an omission to designate the name of the corporation, and the name cannot be gathered from the contents of the act or instrument, no doubt, at this present age, the corporation might acquire one by usage.[15] And it seems reasonable, in such an instance, that the corporators or directors should have the power to bestow a name upon the corporation, the same as an individual may take upon himself a name and be liable thereby in a suit against him. A case not far from supporting this proposition arose in Indiana. A city under a special charter bore a certain name. A general law for the incorporation of cities was enacted with a provision that no city then incorporated should be bound by it unless it accepted its provisions. In this general act there was no provision designating the name of a city incorporated under it, by which it should be known. A city having accepted the provision of the general act, it was held that it was authorized to retain its old corporate name, and such the court would presume it did.[16]

Change of Name and Effect.—The name of a corporation may by changed, usually with the consent of the corporators, and if the identity and ancient rights of the corporation are preserved the change can in nowise effect it, either in its liabilities, duties or property.[17] Such a change does not relieve it from its liabilities,[18] even to the paying of the taxes due from it in its old name;[19] for it does not create a new corporation.[20] And this is true even of a city.[21] In an old case it was said, where the new charter alters the constitution of the corporation and remodels it, it loses its name; but if the constitution in all its intregal parts remain the same, though the new charter give them a new name, the old one remains. And an illustration is given, as if a mayor be added, or a mayor and masters be made mayor and alderman, or an abbot and a convent a dean and chapter, in which instances they lose their old name, because new intregal parts of the corporation are added. "But if the bailiff and burgesses *Villae de Gippo* accept a charter constituting them bailiff and burgesses *Villae Gipwiki*, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts."[22] And of a corporation it was judicially said, that "though the name and style of the corporation and the mode of electing members were changed, the identity of the body itself was not affected."[23]

Same Continued.—If the name of a corporation is changed, all new suits on its old obligations must be brought in its new name;[24] and it is essential to allege the

[14] Attorney-General v. Corporation of Worcester, 2 Phillips, 3; Corporation of Rochester v. Lee, 15 Sim. 376; Grant on Cor. 342; Rawlinson on Cor. 3; 1 Dill Municipal Cor. § 35 and note, § 176.

[15] Smith v. Plank Road, 30 Ala. 650; Anonymous, 1 Salk. 191; Pitts v. James, Hob. 124; Gifford v. Rockett, 121 Mass. 431; s. c., 7 Amer. Cor. Cas. 462; Ayray's Case, 11 Co. 19; 2 Kent Com. 292.

[16] Johnson v. Common Council of Indianapolis, 16 Ind. 227.

[17] Rosenthal v. Madison, etc. R. R. Co., 10 Ind. 358; President, etc. v. Jackson, 7 Blackf. 36; Eaton & Hamilton R. R. Co. v. Hunt, 20 Ind. 457; Episcopal Charitable Society v. Episcopal Church, 1 Pick. 372.

[18] Hazelett v. Butler University, 84 Ind. 230; s. c., 9 Amer. Cor. Cas. 252; Dean v. LaMotte Lead Co., 59 Mo. 523; s. c., 8 Amer. Cor. Cas. 138; Bucksport & Bangor R. R. Co. v. Buck, 68 Me. 81; s. c., 7 Amer. Cor. Cas., 318; 4 Co., 87*b.*; Girard v. Philadelphia, 7 Wall. 1; Regina v. Bewdley, 1 P. Wms. 207; Rex v Passmore, 3 T. R. 119. 247; Colchester v. Brooke, 7 Q. B. 383; Colchester v. Seaber, 3 Burr. 1866; Bellows v. Bank, etc., 2 Mason, 43; Olney v. Harvey, 50 Ill. 453; Neely v. Yorkville, 10 S. C. 141; Heckel v. Sandford, 40 N. J. L. 180.

[19] Macon & Augusta R. R. v. Goldsmith, 62 Ga. 463; s. c., 7 Amer. Cor. Cas., 16. It is to be remarked that a corporation has no right or power of itself to change or alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law. Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co., 8 Amer. & Eng. Cor. Cas., 317; Regina v. Registrar, etc., 10 Q. B. 839; Episcopal, etc. v. Episcopal Church, 1 Pick. 372.

[20] Town of Reading v. Wedder, 66 Ill. 80; s. c., 4 Am. Cor. Cas. 371; Morris v. St. Paul & Chicago R. R. Co., 19 Minn. 528; s. c., 4 Amer. Cor. Cas. 501; Trustees of University v. Moody, 62 Ala. 89; s. c., 6 Amer. Cor. Cas. 190.

[21] State v. Mayor, 24 Ala. 706; Ready v. Mayor, 5 Ala. 339; Broughton v. Pensacola, 93 U. S. 266.

[22] 2 Bac. Abr. 441, citing Regina v. Bailiffs, etc., of Ipswick, 2 Ld. Raym. 1239; s. c., 2 Salk. 433; see Knight v. Mayor, etc. of Wells, 1 Ld. Raym. 80; s. c., Lutw. 508.

[23] Doe, etc. v. Norton, 11 M. & W. 913, 928; see Corporation of Ludlow v. Tyler, 7 Cor. & P. 537; Attorney-General v. Wilson, 9 Sim. 30; Attorney-General v. Kerr, 2 Beav. 420; Attorney-General v. Corporation of Leicester, 9 Beav. 546.

[24] Mayor of Colchester v. Seaber, 3 Burr. 1866; 5

identity of the corporation as known by its two names.[25] If, however, the courts are bound to take judicial knowledge of the name of the corporation both before and after the change, the allegation of identity would be unnecessary. The mere change of name by the legislature while suit is pending does not abate the suit,[26] and there is no reason why a change made under like condition by the corporators should be good cause for an abatement. So where the name of a corporation was changed pending suit, and judgment was taken in the old name, it was held too late to then object that the title of the case was not changed to correspond with the new name.[27] The name of a corporation having been changed by an amendatory act requiring acceptance by the corporators before it would be binding, and the corporation having brought suit after its passage by its old name, it was held not necessary for the corporation to allege and show that its corporation had rejected the amendatory act.[28]

Constitutionality of Act Changing Name.—Where the constitution of a State provided that the legislature should not pass any law granting any "private charter or special privileges," and the legislature passed an act changing the name of a particular corporation, it was held a valid act and not within the prohibition of the constitution.[29] But unless the right is reserved in its charter, or by a general law before its incorporation, the legislature would have no power to arbitrarily change the name of a corporation; for often the name alone is a valuable franchise, and to so change that name would be in direct conflict with the clause of the constitution prohibiting the impairing of the obligation of a contract.

Protected in Use of Name.—And this leads up to the statement that, under the proper circumstances, a corporation will be protected in its use of its name, the same as a firm or individual who has acquired a property right in a name or mark will be protected as against one unauthorizedly using it. The long user of a name may render it a valuable acquisition. Notably in this country is that of certain railroads where, by advertising and usage, they have so fixed the name in the minds of the traveling and shipping public as to bring to them, to the exclusion of as equally good and competing lines, thousands of dollars a year.[30] If the plaintiff has a remedy at law, however, an injunction will not lie.[31] Neither can an individual corporator maintain an action to enjoin the unauthorized usage.[32] Another phase of this question is well stated in the following quotation: "There is no reason why a corporation may not acquire a property right to the use of another name or a trade-mark, or as incidental to the good-will of a business, as well as an individual; and if it has acquired such a right it will of course be protected in its enjoyment, to the same extent as an individual would be. It cannot be deprived of the right by the assumption of the name subsequently by another corporation, and it is immaterial whether the latter selects its name by the act of corporators who organize under the general laws of a State, or whether the name is selected for it in a special act by the legislative body. Manifestly, if the defendant had no right to use the name by which the complainant was incorporated, or one practically identical with it at the time of the latter's incorporation, the title of the complainant is clear, because it adopted the name formally, publicly and legitimately, for all its corporate purposes."[33] But the United States courts have no power to restrain a State officer, simply because certain persons are taking the

Dane Abr. 181; Scarborough v. Butler, 3 Lev. 237; Simapee v. Eastman, 32 N. H. 470; Colton v. Mississippi, etc. Co., 22 Minn. 372; s. c., 7 Amer. Cor. Cas. 603; see Pope v. Capital Bank, 20 Kan. 440; s. c., 7 Amer. Cor. Cas. 130.

[25] West v. Carolina Life Ins. Co., 31 Ark. 478; s. c., 6 Amer. Cor. Cas. 190; Rosenthal v. Madison, etc. Plank Road Co., 10 Ind. 358; Cahill v. Briggs, 8 B. Mon. 211; Ready v. Tuskaloosa, 6 Ala. 327; Madison College v. Burke, 6 Ala. 494.

[26] Thomas v. Frederick School, 7 Gill. & J. 369.

[27] Water Lot Co. v. Bank of Brunswick, 53 Ga. 30; Talbott v. Hale, 72 Ind. 1.

[28] Beene v. Cohawba R., 3 Ala. 660.

[29] Wells Fargo & Co. v. Oregon Ry. & Nav. Co., 16 Amer. & Eng. Cor. Cas. 71.

[30] Newby v. Oregon, etc. R. R. Co., Deady. 609; *Ex parte* Walker, 1 Tenn. Ch. 97; Holmes v. Holmes, etc. Manf. Co., 37 Conn. 278.

[31] London, etc. Soc. v. London, etc. Ins. Co., 11 Jur. 938.

[32] Newby v. Oregon, etc. R. R. Co., Deady, 609.

[33] Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co., 8 Amer. & Eng. Cor. Cas. 317.

necessary steps before him for the formation of a corporation with a name identical with a well known and well established corporation already in existence in another State, and doing business in the State where the proceedings are instituted; for this is an undue interference with the State by the federal authorities. In the case cited, the question was left undecided what the court would do if the bill were filed against the company after its incorporation.[34]

In What Name May Sue.—It is a mere truism to say that a corporation cannot sue in the individual names of its corporators[35] like an association or society,[36] but must bring the suit in its corporate capacity.[37] Since the officers and agents of a corporation should know its exact name, it is held to much strictness in bringing an action in its exact name, and any variance not trifling will be sufficient to defeat the action.[38] As we have seen, a corporation may be authorized to sue in one name and enter into corporate obligation by another, but this rarely, if ever, now occurs.[39] If the action is brought by the plaintiff corporation in a wrong name, the defendant can take advantage of it only by a plea in abatement,[40] and a plea of *nul tiel* corporation in bar would perhaps be a waiver of the misnomer.[41] However, if the corporation has acquired a new name by reputation, and by such it is universally known, there is no reason why it may not sue by that name the same as an individual may; and there are cases that not only lend color to this statement but support it.[42]

When Must Aver Identity with the Corporate Name Used.—It is no uncommon thing for a corporation to carelessly enter into a contract by a name not strictly its own, or to have a deed so executed to it, or to have a bequest thus made to it, or the naming of a corporation in a judicial proceeding is often necessary, although it is not a party to the suit, in connection with a written instrument, wherein it is referred to by a name not strictly its own or by one entirely different. In all such instances the name used must be set out as well as the true name, and identity of the names, as applicable to the corporation, must be averred; and if the misnomer applies to the plaintiff the action must be brought in its true name;[43] and the same is true with reference to the defendant corporation.[44] The variance, if a written instrument, may be so slight as to be immaterial, and the identity of the corporation may be ascertained from the name used. In such an instance averring identity is unnecessary.[45] And the old author-

[34] Lehigh Valley Coal Co. v. Hamblen, 8 Amer. & Eng. Cor. Cas. 201; see the case of Ottoman Cohvey Co. v. Dane, 95 Ill. 203; s. c., 6 Amer. Cor. Cas. 460. What is necessary in Illinois to affect a change of name, see Anthony v. International Bank, 93 Ill. 225; s. c., 6 Amer. Cor. Cas. 453.

[35] Habicht v. Pemberton, 4 Sandf. 657.

[36] Pollock v. Dunning, 54 Ind. 115; Hays v. Lanier, 3 Blackf. 322.

[37] Bradley v. Richardson, 2 Blatchf. 343; Insane Hospital v. Higgins, 15 Ill. 185; Campbell v. Brunk, 25 Ill. 225; Trustees of Lexington v. McConnell, 3 A. K. Mar. 224; Mauney v. Motz, 4 Ired. Eq. 195; Porter v. Neckervis, 4 Rand. 359; Hay v. McCoy, 6 Blackf. 69

[38] Tipling & Pexal, 2 Bulst. 233; Turvill v. Aynsworth, 2 Str. 787; s. c., 2 Ld. Raym. 1515; President, etc. v. Jackson, 7 Blackf. 36.

[39] Chancellor of Oxford's Case, 10 Co. 57.

[40] Stafford Corporation v. Bolton, 1 B. & P. 40; Hoereth v. Franklin Mill Co., 30 Ill. 157. See Burnham v. Savings Bank, 5 N. H. 446.

[41] Trustees of M. E. Church v. Tryon, 1 Denio, 451; Gray v. Monongahela Navigation Co., 2 W. & S. 156. In one case an amendment was allowed at the hearing, and this is no doubt a correct practice. Hoboken, etc. v. Martin, 2 Beas. 427; Bank of Utica v. Smalley, 2 Cow. 770; s. c., 14 Amer. Dec. 526.

[42] Lynne Regis, 10 Co. Rep. 126; Stafford v. Bolton, 1 B & P. 41; Ipswick v. Johnson, 2 Barnard, 120; School District v. Blakeslee, 13 Conn. 227; Queen v. Registrar of Joint Stock Cos., 10 Q. B. 839; Episcopal Charitable Society v. Episcopal church, 1 Pick. 372; King v. Norris, 1 Ld. Raym, 337; Queen v. Baliffs of Ispwick, 2 Ld. Raym. 1232; Alexander v. Berney, 28 N. J. Eq. 90; Angell & Ames, Cor., sec. 645. A corporation may sue by the name of the creation, although, expressly authorized to sue by another name. Physicians College v. Talbois, 1 Ld. Raym, 153.

[43] Northwest Distillery Co. v. Brant, 69 Ill., 658; New York African Society, 13 Johns. 38; Berks, etc. Turnpike Co. v. Myers, 6 S. & R. 12; Commercial Bank v. French, 21 Pick. 486; Alloways Creek Township v. Strong, 5 Halst. 1323; Vansant v. Roberts, 3 Md. 119; Hagerstown Turnpike Co. v. Creque, 5 Har. & Johns., p 123; Oler v. Baltimore, etc. R. R. Co. 41 Md. 583; s. c., 7 Amer. Cor. Cas. 349; Washington Co. National Bank v. Lee, 112 Mass. 440; s. c., 5 Amer. Cor. Cas. 440; All Saints Church v. Lovett, 1 Hall 191; Hammond v. Shepard, 29 How. Pr. 188; Boisgerard v. New York Banking Co., 2 Sandf. Ch. 23; Hoboken, etc. v. Martin, 2 Beas., 427.

[44] Gifford v. Rochett, 121 Mass. 431; s. c., 6 Amer. Cor. Cas. 462; Taton & S. Boston Turnpike v. Whitney, 10, Mass. 327; Gilmore v. Pope, 5 Mass. 491; Tucker v. Seaman's Aid Society, 7 Met. 188; Woolwick v. Forest, 1 Penning. 115.

[45] Motts v. Hick, 1 Cow., 513; Northwestern Distilling Co. v. Brant, 69 Ill. 659; Thacher v. West River National Bank, 19 Mich. 196; Chadsey v. McCrary, 27 Ill. 253; Pitman v. Kintner, 5 Blackf. 250; Mayor and Burgesses of Lynne Regis, 10 Co. 125;

ities lay it down as a rule, if the words used are synonimous with the words of the corporate name, this is sufficient without averring identity.[46] Where a corporation, declaring in covenant by its modern name, stated that the citizens of the incorporation were from time immemorial incorporated by divers names of incorporation, and at the time of making the deed declared on by the plaintiff, were known by a certain other name, by which name the plaintiff granted to them a certain water-course, and covenanted for its quiet enjoyment, it was held that the deed granting the water-course to them by such name was evidence as against the defendants who claimed under the grantor, that the corporation was known by that name at the time upon an issue taken on that fact.[47]

Misnomer of Defendant Corporation.—Like an individual sued by name not his own a corporation will be bound, unless it pleads the misnomer in abatement.[48] Of course a slight variance between the name as laid and as proven is not fatal, as alleging the defendant is a "railroad" corporation, and the proof show it is a "railway" corporation.[49] Where the plaintiff brought the defendant into court by a name it had been formerly known by, but the defendant's name had recently been changed, the court allowed the writ and complaint to be amended by the insertion of the then true name.[50] In many jurisdictions, if service has been had upon the proper corporation by a wrong name, the correct name may be inserted on motion,[51] but this is not the case in others.[52]

Variance of Defendant's Name in Judgment.—It sometimes occurs that where a judgment has been rendered against a corporation by a wrong name, a variance arises in proceedings subsequent to its rendition. Thus, where an execution was issued upon a judgment against a railway company, and levied upon land of the same company under the name of a railroad and then sold, it was held that the name being otherwise identical parol evidence was admisible to show their identity, and, possibly, the court would be justified in assuming the two names to refer to the same corporation, although this question was not decided.[53] But a judgment against a corporation cannot be corrected by striking out the name under which it was sued and served with process and substituting its true name.[54] If it is necessary to plead a judgment taken against a corporation by a wrong name, it must be so served in order to bind it.[55] The corporation cannot escape liability on the judgment when thus rendered against it by an erroneous name.[56] In a suit against "the president and trustees of the Savings bank in the county of Strafford," to recover payment for serving a writ of execution for them, a copy thereof in the name of the "Savings bank of the county of Strafford" was held to be inadmissible in evidence.[57]

Action by or Against Officers of Corporation.—It is sometimes difficult to say whether the action is by or against the officers of the corporation, or against the corporation. Thus, a bill for an injunction charged certain wrongs to have been done by a corporation, setting out its name, but prayed for an injunction against the president and directors of the corporation and a third person, and for a subpœna to issue to the president and directors and such third person. It was held that the corporation itself was not a party to

Brock District v. Bowen, 7 U. C. Q. B. 471; Trent, etc., v. Marshall, 10 U. C. C. P. 336; Whitby v. Harrison, 18 U. C. Q. B. 603; Bruce v. Cromar, 22 U. C. Q. B. 321; Molden v. Miller, 1 B. & Ald. 699; Kentucky Seminary v. Wallace, 15 B. Mon. 45; Medway Cotton Mf. Co. v. Adams, 10 Mass. 360; People v. Love, 19 Cal. 676; Bower v. State Bank, 5 Ark. 234.

[46] 2 Bac. Abr. 442.

[47] Mayor, etc. of Carlisle v. Blamire, 8 East. 487.

[48] 26 H. VIII. 1 b; 1 Kyd. Cor. 283; Northumberland County Bank, 60 Pa. St. 436; Gilbert v. Nantucket Bank, 5 Mass. 97; Lake Superior Building Co. v. Thompson, 32 Mich. 293; s. c., 5 Amer. Cor. Cas. 486. If a mere partnership it must set up that fact by plea: French v. Donahue, 29 Minn. 111; s. c., 9 Amer. Cor. Cas. 479.

[49] Galveston, etc. R. R. Co. v. Donahoe, 56 Tex. 162; s. c., 9 Am. & Eng. R. R. Cas. 287; Newport Mechanics Mf. Co. v. Starbird, 10 N. H. 123.

[50] Pittsburg, etc. R. R. Co. v. Rohrman, 12 Amer. & Eng., R. R. Cas. 176.

[51] Burnham v. Savings Bank, 5 N. H. 573; Hoboken, etc. v. Martin, 2 Beav. 427; Sherman v. Connecticut River Bridge Co., 11 Mass. 338; Georgetown v. Bealty, 1 Cranch C. C. 234; Bullard v. Nantucket Bank, 5 Mass. 99; Lone v. Seaboard, etc., 5 Jones L. 25.

[52] Sams v. Toronto, 9 U. C. Q. B. 181.

[53] Talbott v. Hale, 72 Ind. 1.

[54] Brown v. T. H. & I. R. R. R. Co, 72 Mo. 567; s. c., 8 Amer. Cor. Cas. 270.

[55] Lehman, Durr & Co. v. Warner, 61 Ala. 455; s. c., 6 Amer. Cor. Cas. 155; Wilson & Co. v. Baker, 52, Iowa, 423; s. c., 6 Amer. Cor. Cas. 563; Lafayette Ins. Co. v. French, 18 How. 304.

[56] Wilson & Co. v. Baker, *supra;* Lafayette Ins. Co. v. French, *supra.*

[57] Burnham v. Savings Bank, 5 N. H. 466.

the bill.[58] So in an action of replevin the property was described in the writ as belonging to A, B and C, of H, the trustees of the ministerial fund in the north parish of H." In the subsequent portions of the writ the plaintiffs were referred to as "the said trustees," and "the said plaintiffs." The replevin bond described them as first described in the writ, and they were referred to in the condition thereof as "the above bounden A, B and C, trustees aforesaid," and the bond was signed by them individually, with separate seals. Other papers in the case referred to them by their individual names as plaintiffs. It appeared that there was a corporation named "the trustees of the ministerial fund in the north parish of H," and the plaintiffs claimed title as such corporation. It was held that the action was not brought in the name of the corporation, and could not be mentioned.[59]

Misnomer in Deeds, Grants and Wills.—It is no uncommon thing for corporations to be misnamed in a deed, grant or will. In such a case what is the result?

Deeds or Grants.—And first of deeds and grants, and the old authorities bearing on the question. Less strictness is required in the use of a name in a deed, grant or will than in a writ or court process of any kind; for there the latter may be amended, while the former cannot. Or, as Coke says, "for if a writ abates one might of common right have a new writ, but he cannot of common right have a new bond or a new case."[60] In the case from which this quotation has been made, a special verdict found that the defendant's testator made, sealed, and as his deed delivered, a writing obligatory to the plaintiffs, whose true style was the mayor and burgesses of the borough of the Lord and King of Lynne Regis, commonly called King's Lynne in the county of Norfolk. Upon this verdict judgment was given for the plaintiff. In the notes to this case Coke cites the case of the abbot of York who was incorporated by the name, "The Abbot of the Monastery of the Blessed Mary of York," and a bond was made to the abbot by the name "The Abbot of the Monastery of the Blessed Mary, without the walls of the city of York." The abbot brought an action in his true name which implied that the abbey was within York; and although the abbey was without the walls, yet because it was in truth within the city of York the bond and writ were adjudged good.[61] And in these cases are involved the proposition that if enough be said to show that there is such an artificial being, and to distinguish it from all others the corporation is well named, though the words and syllables of the actual name are varied from; and the same is true if the words used are synonymous with the actual words of the corporate name.[62] So a misdescription of a corporation in a conveyance of a part of their estate for the redemption of the land tax was held immaterial.[63] And in case of a corporation by prescription, where the name had been changed by usage a number of times, a deed to it by one of its earlier names was held valid.[64] So when the the king grants lands to a corporation by a name not its own, the lands pass, and the letters patent, it is said, shall be to them as a new corporation.[65] In an old case,[66] Coke says; "It was observed that till this generation of late times, it was never read in any of our books that any body, politic or corporate, endeavored or attempted, by any suit, to avoid any of their leases, grants, conveyances, or other of their own deeds, for the misnomer of their true name of corporation; but after that a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles (to avoid grants, etc., as well made to them or by them) have followed thereupon, everybody knows; but it was said, for every curious or nice misnomer, God forbid that their leases or grants, etc., should be defeated, for there will be found a difference between writs and grants; and in all cases this is true, *quod apices juris non sunt jura.*"

[58] Binney's Case, 2 Bland. 99.

[59] Bartlett v. Brickett, 14 Allen 62. See Burnham v. President, etc., 5 N. H. 446.

[60] Mayor & Burgesses, 10 Rep. 125.

[61] See Master, etc. of Sussex and Sidney College v. Davenport, 1 Wills. 184.

[62] 2 Bac. Abr. 441, 442. See Ayray's Case, 11 Co. 20, 21; Hob. 124; Cro. Eliz. 816; Poph. 59.

[63] Craydon Hospital v. Farley, 3 Marsh. 174; 6 Taunt. 467.

[64] Mayor, etc. of Carlisle v. Blamire, 8 East. 487.

[65] Dean & Chapter of Christ Church, and Parot's Case, 4 Leon. 190.

[66] Sir Moyle Finch's Case, 6 Rep. 65.

Same Continued.—What has been said of the English cases is equally true of the American. Because of a misnomer of the corporation a deed is not void, if it can be collected from the face of the deed what corporation is intended, aided by extrinsic evidence, to apply its language to external objects.[67] Thus, where the word "academy" was used for "seminary," there being no academy of the name (Kentucky) used, a deed was admitted in evidence, notwithstanding the variance.[68] So a deed by an old corporation in its new name will bind it.[69]

Chancellor Kent upon this question has said: "An immaterial variation in the name of the corporation does not avoid its grant, though it is not settled, with the requisite precision, what variations in the name are or are not deemed substantial. The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it; and the modern cases show an increased liberality on this subject."[70]

Devises to Corporations by Wrong Name.—The rule applicable to deeds and grants is also applicable to devises to a corporation, where the name of the corporation is inaccurately used; and perhaps there is more leniency in cases of wills than in any other instrument. Thus, it is said, a devise to George, Bishop of Norwich, is sufficient, although his name is John;[71] but one to the Abbott of St. Peter, where it is really the Abbot of St. Paul, was said to be void, "for here the saint name is the only specification of the party in the devise, which is mistaken."[72]

The general rule applicable to devises has been stated by an eminent author, as follows: "Where the intention of the testator is clear, a mistake in the name or description of the object of his bounty will not make the devise void. This general principle is applicable to all corporations, public or private. But the intention must be so clear as to remove all reasonable doubt as to the corporations meant."[73] Thus, a devise to "The South Parish in Sutton" was held a good devise to "The First Parish in Sutton," that being its true name.[74] So a devise to "the right worshipful, the mayor, jurats and town council of the town of Rye," was held a good devise to the "mayor, jurats and commonalty of the town of Rye," although there was no town council in the town, and although the court admitted the proposition of council against the will, that if the "intent appears to give to a part of the corporation, although that intent fails of effect, the whole corporation cannot take."[75] Likewise, a devise to the mayor, chamberlain and governors is valid to a corporation whose true name is mayor, citizens and commonalty.[76]

It is not always necessary that an attempt should be made by the testator to use the name of the corporation; it is enough if the corporation is described so as to identify it with sufficient certainty.[77] Thus, in the case just cited, a bequest to "the trustees of the institute for the maintenance and instruction of the indigent blind in the city of New York" was held a good devise to the New York institution for the blind. The court said, by Denio, J.: "The question arises upon the description. It is a question of identity, and the point is, whether the legatee

[67] Chapin v. School District, 35 N. H. 445; Northwestern Distilling Co. v. Brandt, 69 Ill. 658; s. c., 5 Amer. Cor. Cas. 249; Donglass v. Branch Bank of Mobile, 19 Ala. 659; Eastern R. R. Co. v. Benedict, 5 Gray, 561; Berks & Dauphin Turnpike Road v. Myers, 6 S. & R. 12; s. c., 9 Amer. Dec., 402, (a written contract); Hagerstown Turnpike Road Co. v. Creeger, 5 H. & Johns. 122; s. c., 9 Amer. Dec. 495 (a written contract) Oler v. Baltimore, etc. R. R. Co., 41 Md. 591 (a written contract); Culpeper Agricultural & Mfg., Soc. v. Digges, 6 Rend., 165; s. c., 18 Am., Dec. 708 (a written contract); Union Bank of Florida v. Call, 5 Fla. 409; Brittan v. Newland, 2 Dev. & Bat. 363; Insane Asylum v. Higgins, 15 Ill. 185; Clark v. Potter Co., 1 Barr 163; Porter v. Blakely 1 Root, 440; Romeo v. Chapman, 2 Mich. 179; County Court v. Griswold, 58 Mo. 175; Corder v. Commrs. 16 Ohio St. 353; Trustees v. Campbell, 16 Ohio St. 11.

[68] Kentucky Seminary v. Wallace, 15 B. Mon. 35.

[69] Mount Palatine Academy v. Kleinschnitz, 28 Ill. 133.

[70] 2 Kent. Conn. 292.

[71] 2 Bac. Abr. 442, citing Leon. 307; Dyer, 106; 11 Co. 21; Perk. 8; Owen, 35, Dalis. 78.

[72] Id; citing Hob. 33; and 19 H. 8, 8.

[73] 1 Dill Municipal Cor., sec. 179.

[74] First Parish in Sutton v. Cole, 3 Pick. 232.

[75] Attorney-General v. Mayor of Rye, 7 Taunt. 546; s. c., 2 E. C. L. R. 213.

[76] Owen, 35.

[77] New York, etc. v. How's Exr., 6, Selden, 84.

can be found and certainly identified by the description contained in the will. The description is not shown to be erroneous, though there be a different class of persons also to be relieved, or if some are to be instructed merely and not supported, I do not upon the whole see how a description, complied in a brief sentence, could more accurately have but the leading particulars which go to define this corporation and to distinguish it from all others." So a devise to the "Home of the Friendless in New York," was held a good devise to "The American Female Guardian Society" in New York.[78] So a devise to "The Society for the Relief of Indigent Aged Females," was a good devise to "An Association for the Relief of Respectable Aged Indigent Females in the city of New York," in preference to "St. Luke's Home for Indigent Christian Females;" and in the same case it was said, that if it was impossible to tell which of the two corporations was meant by the testator the court would hold the devise void, in place of dividing it equally between the claimants, in accordance with the English rule.[79] A gift to the Presbyterian Orphan Asylum of Louisville was adjudged to the Louisville Orphan Home Society, on proof that it was generally known by the name of the Presbyterian Orphan Aslyum. And in the same case "The House of Mercy, New York," was held intended as a gift to "The House of Mercy of the city of New York," as against "The Institution of Mercy," located in the same city.[80]

If the name used applies equally well to either of two claimant corporations, then extrinsic evidence must be resorted to; and in one case, the fact that the testator was a subscriber and life director of one corporation turned the scale in favor of that corporation.[81] If one corporation was reasonably described, another could not claim the legacy, for that would vary the terms of the will.[82]

[78] Lefevre v. Lefevre, 2 T. & C. 330; on appeal 59 N. Y., 434.

[79] St. Luke's, etc. v. Association etc., 52 N. Y. 191; see Holmer v. Mead, 52 N. Y., 332.

[80] Cromie's Heirs v. Louisville Orphan Home, etc., 3 Bush, 365.

[81] *In re* Briscoe's Trusts, 20 Weekly Reporter, 355; See Button v. The Amer. Tract Society, 23 Vt. 336.

[82] *Id.;* Delmar v. Robello, 1 Ves. 412.

Further illustrations will be found in the note below.[83]

Name Used in Suits Importing a Corporation.—If the name of a corporation suing is stated in the complaint or declaration, and the name is such that it implies that the plaintiff is a corporation, an express averment to that effect is unnecessary.[84] And if the person objecting to the complaint because

[83] Grimes v. Harmon, 35 Ind. 198; Cruse v. Axtell, 50 Ind. 49; Craig v. Secrist, 54 Ind. 419; Sayers v. First National Bank, 89 Ind. 230; Chapin v. School District, 35 N. H. 445; New York Society, etc. v. Clarkson, 21 Halst. 541; Goodell v. Union Association, 29 N. J. Eq. 32; Kilvert's Tr. 12 L. R. Eq. 183; Alchin's Tr. 14 L. R. Eq. 230; McAllister v. McAllister, 46 Vt. 272; Frierson v. Gen. Ass. Pres. Ch. 7 Heisk. 683; Newall's Appeal, 24 Pa. St. 197; Hornbeck v. Amer. Bible Soc., 2 Sandf. Ch. 133; DeCamp v. Dobbins, 2 Stew. (N. J.) 36; Minot v. Boston Asylum, 7 Met. 416; Smith v. Smith, 11 C. E. Gr. 139; Baldwin v. Baldwin, 2 Halst. Ch. 211; McBride v. Elmer, 2 Halst. 107; Dickson v. Montgomery, 1 Swan. 348; Banks v. Phelan, 4 Barb. 80; Wright v. Methodist Epis. Ch., Hoffman's Ch. 202; Parker v. Cowell, 16 N. H. 149; Tucker v. Laman's Aid. Soc., 7 Met. 188; Howard v. Amer. Peace Soc., 49 Me. 288; Preacher's Aid. Soc., v. Rich. 45 Me. 552; Amer. Bible Society v. Wetmore, 17 Conn. 181; Ayres v. Mead, 16 Conn. 291; Brewster v. McCall, 15 Conn. 274; Bodman v. Amer. Tract. Soc., 9 Allen, 447.

[84] Richardson v. St. Joseph Co., 5 Blackf. 146; Harris v. Muskingum Mf. Co., 4 Blackf. 146; Norris v. Staps, Hobbart 211; O'Donald v. Evansville, etc. R. R. Co., 14 Ind. 259; Jones v. Cincinnati Type Foundry, 14 Ind. 89; Hubbard v. Chappel, 14 Ind. 601; Dunning v. New Albany & Salem R. R. Co. 2 Ind. 437; Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274; Emery v. Evansville, etc. R. R. Co., 13 Ind. 143; Heaston v. Cincinnati, etc. R. R. Co.,16 Ind. 275; Adams Express Co. v. Hill, 43 Ind. 157; Indianapolis Sun Co. v. Harrell, 53 Ind. 527; Lighte v. Everett Fire Ins. Co., 5 Bosw. 716; Cole v. Merchants Bank, etc., 60 Ind. 350; Walker v. Shelbyville, etc. Co., 80 Ind. 452; Beatty v. Bartholomew, etc., 76 Ind. 91; McKeil v. Real Estate Bank, 4 Ark. 592; Agnew v. Bank of Gettysburg, 2 H. & G. 478; Shoe & Leather Bank v. Brown, 9 Abb. Pr. 218; s. c. 18 How Pr. 308; Acorne v. American Mineral Co., 11 How Pr. 24; Kennedy v. Cotton, 28 Barb. 59; Lafayette Ins. Co. v. Rogers, 30 Barb. 491; Phenix Bank v. Donnell, 41 Barb. 571; Union Mutual Ins. Co. v. Osgood, 1 Duer, 707; Zion Church v. St. Peter's Church, 5 W. & S. 215; Bermington Iron Co. v. Rutherford, 18 N. J. L. 105; Litchfield Bank v. Church, 29 Conn. 148; U. S. v. Ins. Cos. 22, Wall. 99; Pullman v. Upton, 96 U. S. 328; Monumoi Great Beach v. Rogers, 1 Mass. 159; Plymouth Christian Society v. Macomber, 3 Met. 235; School District v. Blaisdell, 6 N. H. 197; Concord v. McIntire 6 N. H. 527; Brown v. Illinois, 27 Conn. 84; West Minsted Saving Bank v. Ford, 27 Conn. 282; Taylor v. Illinois Bank, 7 T. B. Mon. 584; Methodist Church v. Cinctnnati, 5 Ohio. 286; Woodson v. Gallipolis Bank, 4 B. Mon. 203; Jones v. Tennessee Bank, 8 B. Mon. 122; Roxbury v. Huston, 37 Me. 42; Orono v. Wedgewood, 44 Me. 49; Grays v. Turnpike, 4 Rand. 578.

it is not so expressly alleged has contracted with the corporation by a name implying that it is a corporation, he is estopped to assert that it is not,[85] although in some jurisdictions it is held that a statement to that effect must be inserted in the written contract sued upon to work an estoppel.[86] And the general rule, admitting in the contract the capacity of the corporation to sue by the name used in it, either expressly or impliedly, applies where the corporation assigns the instrument sued upon or called in question.[87] The general issue in such cases admits the capacity in which the plaintiff sues.[88] So where the property of a corporation was burned, in a charge of arson, it was held not necessary to allege that the corporation was duly incorporated, because the name used implied that it was a duly incorporated company.[89] If the corporation is one foreign to the jurisdiction in which the suit is brought, it has been held in some of the States following the above rules, that the existence of the corporation must be proven.[90]

In England and some of the States, under the general issue, the fact of incorporation must be proven, even though the name imports that it is such;[91] but even in these States it is admitted that if the corporation is a public one, such as the courts are bound to judicially notice, it need not be averred or proven that they are incorporations.[92] This distinction between public and private corporations will account for the seeming conflict in the citation of cases from the same State to different propositions.[93]

Crawfordsville, Ind. W. W. THORNTON.

[85] Jones v. Cincinnati Type Foundry, 14 Ind. 89; Hubbard v. Chappel, 14 Ind. 601; Stein v. Indianapolis, etc., 18 Ind. 237; Mackenzie v. Board, etc., 72 Ind. 189; Northwestern Conference, etc. v. Myers, 36 Ind. 375; Den v. Von Houten, 5 Hals. 270.

[86] Williams v. Bank of Michigan, 7 Wend. 540; Welland Canal Co. v. Hathaway, 8 Wend. 480.

[87] Hubbard v. Chappel, 14 Ind. 601.

[88] Railsback v. Liberty, etc., 2 Ind. 656; Cicero Hygienne Draining Co. v. Craighead, 28 Ind. 274.

[89] Johnson v. State, 65 Ind. 204.

[90] Gospel Society v. Young, 2 N. H. 310; School District v. Blaisdell, 6 N. H. 198; Lord v. Bigelow, 8 Vt. 445; Lewis v. Kentucky Bank, 12 Ohio, 132; U. S. Bank v. Stearne, 15 Wend. 314; Michigan Bank v. Williams, 5 Wend. 478; Marine Ins. Co. v. Jauncey, 1 Barb. 436.

[91] Henriques v. Dutch West India. Co., 2 Ld. Raym. 1535; Peters v. Mills, Buller N. P. 107; Norris v. Staps, Hob. 210*b*; Jackson v. Marietta Bank, 9 Leigh. 240; Rees v. Conococheague, 5 Rand. 326; Taylor v. Alexander Bank, 5 Leigh. 471; Farmer's Bank v. Troy City Bank, 1 Doug. (Mich.) 457.

[92] Agnew v. Gettysburg Bank, 2 H. & G. 478; Carmichael v. School Lands, 3 How (Miss.) 84; Hays v. N. W. Bank, Gratt. 127; Durham v. Daniels, 2 Gr. (Ia.) 518.

[93] There is a subject akin to the one treated in the above article, viz: The Doctrine of *Descriptio Personae* as applied to written instruments. This subject, so far as it applies to bills and notes is fully set forth by W. F. Elliott Esq., of Indianapolis, Indiana, in 16 Cent. L. J. 342.

AGENCY—RATIFICATION—STATEMENT OF AGENT, WHEN BINDING ON PRINCIPAL—PRACTICE IN APPELLATE COURT.

UNITED STATES, ETC. CO., V. RAWSON.

Supreme Court of Indiana, April, 13, 1886.

1. A principal is bound by the acts of his agent if, after knowledge he ratifies them, and such ratification relates back to the time the acts were performed, and is equivalent to an antecedent absolute authority to perform those acts.

2. A principal is bound by the statements of his agent, made in the discharge of his duty as such agent, provided such statements constitute part of the *res gestæ*.

3. When a complaint is assailed for the first time in the appellate court, and one paragraph (or count) is good and the other defective, the assignment of error for such defect cannot be sustained. And this is the rule, even if the verdict and judgment rest upon the insufficient paragraph. *Aliter*, however, if there had been a separate demurrer to each paragraph overruled in the trial court.

The facts appear sufficiently in the opinion of the court.

ZOLLARS, J., delivered the opinion of the court:

The jury returned a special verdict, in which found the following among other facts:

"The express company was doing business over a line extending from Michigan City to and beyond Arcadia, in Hamilton county. Its business consisted partly in forwarding and collecting bills of exchange, etc., for its customers and patrons. In August, 1883, it received from appellees, at Michigan City, a bill of exchange for $167, drawn by them upon one Dickover at Arcadia. This bill was indorsed to and received by the company for collection, and for that purpose was forwarded to its agent at Arcadia, he being in charge of all its business at that place. On the twenty-fifth day of August, 1883, Dickovor paid to the agent at Arcadia $100 upon the bill. At the time the money was thus paid that agent, under a rule of the com-

pany, had no authority to receive partial payments upon such bills, but appellees had no knowledge of the existence of the rule. The agent of the company at Michigan City obtained the consent of appellees 'to receive the said one hundred dollars,' informed the agent at Arcadia of such consent, and directed him to transmit said money, which he failed to do, but afterwards converted it to his own use, and fled."

Upon the return of this verdict, appellant, by counsel, moved for a *venire de novo*. This motion was overruled, and, over a motion for a new trial, judgment was rendered in favor of appellees upon the verdict for the $100, and interest thereon from the time of payment by Dickover.

The only objection made to the verdict—and that not well founded in fact—is that it is not found therein whether authority to receive the partial payment was given to the agent at Arcadia before or after he received the $100. It is not stated in the verdict, in so many words, but it clearly appears from the whole verdict, that the special directions to the agent at Arcada to forward the money were given after it had been paid over by Dickover, and after that fact was known to the agent at Michigan City. The finding, as will be observed, is that, under a rule of the company, the agent at Arcadia had no authority to receive partial payments upon such bills. The company, of course, had authority to receive partial payments, unless restricted by appellees. No such restrictions seem to have been imposed. It is not shown whether the agent at Michigan City was a general agent of the company, or one with limited authority. The case, however, was conducted below upon the theory that his directions, whatever they were, were authoritative and binding upon the company, and so the case is treated here. We assume, therefore, that he had authority to direct the agent at Arcadia, and to authorize him to receive a partial payment upon the bill. If, possessing that authority, he had given such directions before the money was paid by Dickover, there could be no question as to the liability of the company for the money so received. And, having authority to thus direct the agent at Arcadia in advance, he had authority to ratify the acts of that agent in receiving the payment as it was made. The ratification of an agent's acts, with knowledge of the circumstances, relates back to the time when such acts were performed, and binds the principal the same as if authority had been given in advance. Bronson's Ex'r v. Chappell, 12 Wall. 681; Story, Ag. (8th ed.) §§ 239-242; Lawrence v. Taylor, 5 Hill, 107; Lowry v. Harris, 12 Minn. 255, (Gil. 166); Hankins v. Baker, 46 N. Y. 666; Hammond v. Hannin, 21 Mich. 374; McIntyre v. Park, 11 Gray, 102; Louisville, E. & St. L. Ry. Co. v. McVay, 98 Ind. 391, and cases there cited. In this case, the verdict shows that, after the money had been paid, the agent at Michigan City, with knowledge of the fact, directed its transmission by the agent at Arcadia. This amounted to a ratification of the act of that agent in receiving the money. Story, Ag. (8th ed.) § 252.

It is claimed, however, that the verdict is not sustained by the evidence, and that, therefore, the motion for a new trial should have been sustained. The contention is that, at the time Dickover paid the money to the agent, he knew that he had no authority to receive a partial payment, and that hence there was no payment upon the bill held by the agent for collection; and, further, that whatever may be said of the balance, as to $30 of the amount it was a loan by Dickover to the agent, and not a payment upon the bill. The evidence shows that, after being notified, Dickover went to the office on Saturday to pay $100 upon the bill. On his way to the office he received a note from the agent, asking a loan of $30. After reaching the office the agent renewed the request. Dickover told him that he had nothing but the $100 bill, and wanted to pay that upon the bill of exchange, and that, so far as he was concerned, he, the agent, could use $30 of the amount until the following Monday. The agent said that he could not indorse the $100 upon the bill by reason of its being a partial payment. Dickover told him to notify the parties, and ask them to receive it. He promised to do so. On the following Tuesday the agent told Dickover that he was expecting a letter on that day. On the following Thursday he said that he had received a letter, and had forwarded the $100, and asked how soon the balance would be paid. The evidence is vague, and not very satisfactory; but, over the finding of the jury, and the repeated statements of Dickover that he paid the full amount upon the bill, we cannot say that $30 of it was a loan to the agent. The evidence also shows that the agent at Michigan City asked appellees if they would receive a payment of $100 upon the bill, and was answered in the affirmitive. This evidence tends to show that the agent knew that that amount had been paid upon the bill, and ratified the act of the agent at Arcadia in receiving it. It is not shown at what particular time that agent converted the money to his own use, but that cannot be material here, as between the company and appellees. He remained in the employ of the company for some time after the payment, and left without transmitting the money.

The evidence, at least, tends to show that he received the money for the company and as a payment upon the bill, upon the single condition that if appellees would accept it the amount should be indorsed upon the bill. That act was ratified by the company through its agent at Michigan City. It is a general rule that an agent cannot bind his principal by statements in relation to a past transaction, but that rule can have no application to the statements of the agent at Arcadia in relation to the letters and the transmission of the money, because they were a part of the *res gestæ*. They were statements, in effect, that the restriction had been removed, and that the amount could be and would be indorsed upon the bill.

The complaint, consisting of two paragraphs, is assailed for the first time in this court by an assignment that it does not state facts sufficient to constitute a cause of action. It is conceded that one paragraph is good; but it is contended that as the record shows that the verdict and judgment rest upon the other paragraph, which, as claimed, is not good, and the judgment should be reversed. Such an assignment calls in question the sufficiency of the complaint as a whole, and hence, if there is one good paragraph, the assignment cannot be maintained. Louisville, etc., Ry. Co. v. Peck, 99 Ind. 68, and cases there cited. This rule is not varied by the fact that the verdict and judgment may rest upon an insufficient paragraph. Had a separate demurrer to each paragraph been overruled below, the result would be different. Pennsylvania Co. v. Holderman, 69 Ind. 18.

There being no valuable error in the record, the judgment is affirmed at appellant's costs.

NOTE.—A ratification is an agreement to adopt an act performed by another for us.[1] Expresss ratifications are those made in express and direct terms of assent. Implied ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his one use. Ratification is equivalent to original authority to act in the matter ratified. The ratifier adopts the unauthorized act and is bound by it.

By ratifying a contract a man adopts the agency altogether, as well what is detrimental as that which is for his benefit.[2] The act of an agent cannot be affirmed as to part, and avoided as to the rest.[3] A ratification of part of an unauthorized transaction of an agent, or one who assumes to act as such, is a confirmation of the whole; and the act of a public officer, exceeding the authority conferred on him by law, may be adopted by the party for whose benefit it is done[4] One who ratifies an act done in his name ratifies it as done, and the principal cannot make such an agent responsible for not doing the ratified act in the manner he would have been bound to perform it if he had been an authorized agent.[5] An assumed agent is not responsible for his acts, even though they turn out to be injurious, provided the principal has once adopted them.[6]

A ratification once deliberately made, upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot afterwards be revoked or recalled.[7] And the ratification will in general relieve the agent from all responsibility on the contract, although without such ratification he would be liable to the other contracting party for his misrepresentation or mistake.[8] The contrary doctrine seems to have been held in New York,[9] but in a carefully considered Minnesota case the courts say, that if the question were now a new one in New York it would probably be differently decided.[10] A ratification does not in general depend on its being communicated.[11] And it can only be effectual when the act is done by the agent avowedly for, or on account of, the principal, and not for himself or some other party.[12] A parol ratification of a contract entered into by another as his agent by writing under seal, will not render the contract obligatory on the the principal, unless the agent's authority was under seal.[13] But a partner may ratify by parol a contract made by a partner, under seal, in the name and for the use of the firm, in the course of the partnership business.[14] Where a contract is signed by one who proposes to be signing "as agent," but who has no principal existing at the time, it cannot be ratified by a principal who subsequently comes into existence. This principle applies chiefly to the promoters of proposed joint stock companies.[15] The principal must be *capax negotii* when ratifying.[16] He also must know all the essential facts,[17] but if the facts are open to him he will be presumed to be duly informed, unless suppression of the facts is proven.[18] If the material facts are suppressed the ratification is invalid, because founded on mistake or fraud.[19]

As between the principal and the agent, an assumption of the agent's unauthorized act is not always necessarily a ratification as against the agent.[20] No new consideration is required to support a ratification.[21] If an agent has no right to appoint a substitute, yet, if the principal adopt the acts of the sub-agent, that will validate the sub-agency.[22] In England, it is held that a forgery cannot be ratified,[23] and generally any illegal or nniversal contract cannot be ratified, yet in this country the courts hold that a principal may ratify a forgery of his name.[24] The maxim *omnis ratihabitio retrotrahitur et mandato equiparatur*, applies to corporations as well as to natural persons.[25] A corporation may ratify an unauthorized contract, provided it could, in the first instance, have been entered into by the coroporate authorities.[26]

Both the principal and his agent may ratify the acts in their behalf of an unauthorized person; and the principal is bound by the ratification of his agent, if the agent had authority to do the thing he ratified.[27]

[1] Bouvier's Law Dict.; Sentell v. Kennedy, 29 La. 679; Bray v. Gunn, 53 Ga. 144.

[2] Smith v. Hodson, 4 T. R. 211; Newall v. Hurlbert, 2 Vt. 351; Crans v. Hunter, 28 N. Y, 389.

[3] Wilson v. Poulter, 2 Strange, 859; Benedict v. Smith, 10 Paige, 126; Krider v. Trustees, 31 Iowa, 547.

[4] The Farmers' L. & T. Co. v. Walworth, 1 Coms. (N. Y.) 433.

[5] Menkens v. Watson, 27 Mo. 163.

[6] Corning v. Southerland, 3 Hill, 553.

[7] Smith v, Cologan, 2 T. R. 188; Clarke's Ex. v. Van Reimsdyk, 9 Cranch, 153.

[8] Spittle v. Lavender, 2 Brod. & Bing. 452.

[9] Rositer v. Rossiter, 8 Wend. 494; Palmer v. Stephens, 1 Denio. 471.

[10] Sheffield v. Ladue, 16 Minn. 388.

[11] Bayley v. Bryant, 24 Pick. 208.

[12] Wilson v. Tumman, 6 Mann. & Gr. 236; Watson v. Swan, 11 C. B. (N. S.) 750; Ancona v. Marks, 7 H & N. 686.

[13] Blood v. Goodrich, 9 Wend. 68; Hanford v. McNair, 9 Wend, 55.

[14] Cady v. Shepherd, 11 Pick. 400; McNaughten v. Harper, 11 Ohio, 223.

[15] Stainsby v. Fraser's Co., 3 Daly, 98; Kelner v. Baxter L. R. 2 C. P. 174; Gunn v. London & L. F. Ins. Co., 12 C. B. (N. S.) 694.

[16] McCracken v. San Francisco, 16 Cal. 591.

[17] Lester v. Kinnie, 37 Conn. 8; Tedrick v. Rice. 13 Ia. 214; Billing v. Morrow, 7 Cal. 171; Mannsing v. Gasharie, 27 Ind. 399; Maxey v. Heckthorn, 44 Ill. 437.

[18] Meehan v. Forrester, 52 N. Y. 277.

[19] Owings v. Hull, 9 Peters, 608.

[20] Walker v. Walker, 15 Heisk. 425.

[21] Drakely v. Gregg, 8 Wall. 24.

[22] Soames v. Spencer, 1 Dowl. & Ry. 32.

[23] Brook v. Hook, L. R., 6 Ex. 89.

[24] Forsyth v. Day, 46 Me. 176; Greenfield B'k v. Crafts, 4 Allen, 447.

[25] Kelsey v. The Nat. B'k of Crawford Co., 69 Penn. St. 426; City of Detroit v. Jackson, 1 Doug. 106.

[26] Taymouth v. Koehler, 33 Mich. 26.

[27] Mound City Mut. Life Ins. Co. v. Huth, 49 Ala. 538.

An infant cannot ratify a contract made by an assumed agent, but he may ratify his own contract.[28] The facts which the court is authorized to declare as conclusive of the intention of a party to ratify unauthorized acts done in his behalf by another, are such as must be inconsistent with a different intention. When the intention with which the act is done is not clear, the presumption of ratification is far less strong where no relation of agency existed. When the evidence is doubtful the question must be determined by the jury.[29] When a policy of marine insurance is made by one person without authority on behalf of another, it may be ratified after the loss of the thing insured, even where the party knows of the loss at the time of his ratification.[30] The question whether silence amounts to a ratification is for the jury.[31]

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[28] Armitage v. Widoe, 36 Mich. 124; Holmes v. Rice, 45 Mich. 142.
Abbott v. May, 50 Ala. 97.
[30] Williams v. North China Ins. Co., 1 C. P. Div. 757.
[31] First Nat. B'k of Sturgis v. Reed, 35 Mich. 263.

EMINENT DOMAIN—CORPORATION—RAILROAD — FUTURE USE — REASONABLE TIME.

IN RE STATEN ISLAND, ETC. CO.

Court of Appeals of New York, October 5, 1886.

1. A railroad corporation, empowered by law to exercise the right of eminent domain, may cause the condemnation of private property to its use, although the need for such property is not immediate, provided the property in question is certainly to be brought into use within a reasonable time after its condemnation.

2. The same principle applies although the property sought to be condemned is to be primarily devoted to the use of a foreign railroad corporation, whose line is to be thereby connected with the domestic corporation that makes the application, provided such use shall tend to subserve the same public use to which the domestic corporation is devoted.

Appeal from an order condemning lands for the purpose of connecting the petitioning railroad company with the line of a foreign railroad.

The facts sufficiently appear in the opinion.

RUGER, C. J., delivered the opinion of the court.

Many of the questions discussed in the learned brief of the appellant's counsel do not seem to be open for consideration here, as they were neither raised in the court below nor authorized by the order under which they were permitted to defend. Aside from a request to dismiss the proceedings upon the ground of indefiniteness in the description of the land proposed to be taken, and which is not now raised by counsel, we find no objection in the record to the adjudication under consideration, except that the alleged insufficiency of the evidence to show that the property proposed to be taken was required for the purposes of the petitioning corporation. A motion was made to dismiss the petition for that reason, which was denied, and the appellant excepted to this decision. This exception presents the only material question exhibited by the record before us. The appellant was restricted to this ground of objection by the terms of an order vacating *pro tanto* an adjudication already made in the proceedings, and was therefore precluded from raising any other ground of defense. Questions as to the corporate organization of the petitioning company, its action in authorizing these proceedings, the right of a railroad company to acquire its lands under navigable water as against the State, and the rights and interests of littoral owners in such lands, are therefore all excluded from the controversy by the terms of the order opening the appellant's default.

The original order of condemnation appointing commissioners to appraise the value of the land proposed to be taken, constituted an adjudication in favor of the respondent upon the questions involved, disposing of every question which might have been raised in opposition thereto, except that allowed to be litigated by the order referred to. It was conceded by the petitioners upon the hearing that the lands in question were not required for its present uses, and it is strenuously contended therefrom by the appellant that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future. It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement; and it is therefore well settled in this State that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to a proceeding to condemn it.

The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain, not only from individuals, but also from the State, for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt. Lansing v. Smith, 8 Cow. 146; s. c., 4 Wend. 9; section 21, Laws 1850, c. 140; Rensselaer & S. R. R. v. Davis, 43 N. Y. 137; *In re* New York Cent. & H. R. R. R. Co., 77 N. Y. 249. The exercise of this power is in derogation of individual rights, and is always burdensome and often injurious to the owner, beyond the power of pecuniary compensation to wholly redress, and should be allowed only when the necessity for the land clearly appears, and its proposed use is clearly embraced within the legitimate objects of the power.

The only question, ther fore, in the case is, whether the evidence shows such a case as renders it probable that these lands will be required within a reasonable period for the uses of the petitioning corporation. No evidence was offered by the appellant upon the question at the trial, and

relies wholly for its defense upon the insufficiency of the proof given by the petitioner to establish a case for condemnation. The special term found, as a fact, that "the land was required by the petitioner for the purposes of its incorporation, to-wit, for tracks, switches, sidings, and depot grounds, whereon cars may be moved, loaded and unloaded, stored, received, and dispatched; for freight-sheds wherein freight may be received and stored, and then loaded into cars and delivered to consignees; and for necessary terminal grounds for the purpose of the incorporation of said company, and for the purpose of constructing and operating its railroad." It was further found that such use was not required for the purpose of its local traffic, but for the purpose of enabling it to fulfill the obligations of a contract made between it and the Baltimore & Ohio Railroad Co., whereby it had bound itself to furnish to such company accommodations over its road for transporting freight, passengers, express and mail matter between the proposed termini of such Baltimore & Ohio road, at Elizabethport, in New Jersey, to and from the city of New York. We think the evidence fully supported these findings.

The proof shows that the petitioner is a domestic railroad corporation, operating a line of road on Staten Island, which has been mainly used heretofore for local purposes, but which is now proposed to utilize as a connecting link between the system of railroads known as that of the Baltimore & Ohio and the Port & City of New York. The vast increase of business which such a connection will occasion to the petitioner's railroad, and the necessity of increased facilities for handling it, is too obvious to be disputed. The benefit to be derived from such a connection, not only to the public, but also to the petitioner, is clearly apparent from the evidence, and renders the object for which the appropriation of the land in question is sought a public use within the meaning ascribed to that term by the decisions of of this court. *In re* New York & H. R. R. Co. v. Kip, 46 N. Y. 547; *In re* New York Cent. & H. R. R. Co., 77 N. Y. 263.

The fact that the condemnation of the land in question is also earnestly desired by a foreign railroad corporation, and will inure largely to its benefit, furnishes no reason for denying the relief asked for by the petitioner, provided it has brought itself within the language of the statute authorizing such a proceeding. *In re* New York, L. & W. R. R. Co., 99 N. Y. 21; s. c., 1 N. E. Rep. 27.

It is claimed that because certain structures which are required to be built in order to form the connection between the two systems of railroads are not yet begun or completed, that their construction is conjectural and uncertain, and does not afford a sufficient degree of probability of their ultimate construction as authorizes the court to condemn the property in question for its proposed uses. The principal structures referred to are the extension of the petitioner's railroad over a bridge or viaduct to be erected across Arthur's kill, which divides Staten Island and New Jersey, and the building of a railroad track by the Baltimore & Ohio Railroad Company from Bond Brook to Elizabethport, in New Jersey, a distance of about sixteen miles, connecting the roads of the contracting parties. The evidence shows that the petitioner is bound by its contract with the Baltimore & Ohio Railorad Company to construct such bridge, and perfect its facilities for accommodating the increased traffic, within one year from the date of the contract, viz., October 28, 1885, unless obstructed and delayed by hostile legal proceedings or want of lawful authority to do so; and, in case of delay from such causes, then with all reasonable diligence after such obstacles have been removed and authority obtained. The same contract provides that the Baltimore & Ohio Railroad Company shall, within one year from the date thereof, or, if delayed by hostile legal proceedings, with all reasonable diligence, perfect its connection at Elizabethport with the railroad of the petitioners. It thus appears that the contemplated connection between the petitioner's railroad and the vast system of railroads controlled by the Baltimore & Ohio Company is assured by contract obligations between parties interested in making such connection, and presumptively able to comply with their obligations if no legal obstacles prevent. It also appears that the contracting parties have already built and leased lines stretching over several hundred miles for the purpose of carrying out the purpose in view, and that the Baltimore & Ohio Railroad Company has already, in the performance of its contract, assumed liabilities for the Staten Island Rapid Transit Railroad Company, to the amount of two and one-half millions of dollars, and has advanced and expended money in the purchase of property on Staten Island and elsewhere, and in extending its tracks for the purpose of the traffic contemplated to be carried on over the petitioner's road, of upwards of a million of dollars. The pecuniary expenditures made, and the liabilities assumed by both of the contracting parties, as well as the manifest interest which both of them have in carrying into effect the projected enterprise, afford the most conclusive assurance that this application is made in good faith, and for the sole purpose of acquiring property for the use of the petitioning railroad company. All of the testimony taken on the hearing concurs as to the necessity of the appropriation of all of the property described for the proposed use, and we have been referred to no circumstance appearing in the case which seems to cast any suspicion upon the motives of the petitioner in preferring the application.

While the limitations under which the respondent is permitted to defend this proceeding do not permit it to raise any questions as to the authority of the court to entertain the proceeding and grant the relief sought, it may be proper to

say that it seems to be fully authorized by sections 21 and 25 of the general railroad act, and the cases of Lansing v. Smith, 8 Cow. 146; s. c. on appeal, 4 Wend. 9; Gould v. Hudson River R. Co., 6 N. Y. 524; and *In re* New York Cent. & H. R. R. Co., 77 N. Y. 248.

It is also proper to say that the enactment of congress, during its last session, of a bill authorizing the contracting parties hereinbefore referred to to build a railroad bridge or viaduct across Arthur's kill, has apparently removed any legal objection to such a structure, and rendered it quite certain that the connections contracted for between such parties will be made, and the property sought to be obtained by this proceeding devoted to the purposes alleged in the petition.

The order should be affirmed, with costs.

All concur except MILLER, J., absent.

NOTE.—It will be observed that, in the principal case, the court excluded from its consideration, as not within the scope of the orders made in the case, a number of interesting questions, and confined itself to the question whether, under the right of eminent domain, a railroad company could take land not required for present use, but supposed to be essential to the prospective future exercise of its franchise.

It is very fully settled that, neither the State nor any corporation under its authority, can, by virtue of the right of eminent domain, take private property for any other than a public use.[1] The question naturally arises: What is a public use? In California, it was held last April, that to take water to supply "farming neighborhoods" (for irrigation purposes) was a public use, for which the right of eminent domain might well be exercised.[2] This ruling, it will be remembered, agitated the Pacific slope all last summer with the vehemence of an average earthquake. It would hardly seem to be within the rule to invade the property of private persons, in order that other private persons might raise crops on their private property, but the peculiar climate of the country will probably justify the ruling. In an earlier case, in the same State, it is held, upon better reason, that private property may be taken under the right of eminent domain to supply with water the inhabitants of an incorporated city.[3]

In Illinois, it is held that the right of eminent domain cannot be exercised for a branch railroad to the works of a private company, although the road is intended as a feeder to the public railroad. The court says that the right to condemn lands for public purposes is legislative, and the only judicial function which the courts can exercise in the matter, where the power has been delegated to a corporation, is to prevent its abuse, and regards it as a manifest abuse of the power to condemn lands in order to build railroads to private industrial establishments, and this, although the interests of the corporation would be subserved thereby and the volume of its business increased.[4] That fact will not authorize a railroad thus to deviate from its present bed line, to subserve private interests, as well as its own.[5]

The Supreme Court of the United States has held that a steam grist mill is not a work of internal improvement, within the statute of Nebraska, so as to authorize the issuance of county bonds in its aid,[6] nor *a fortiori* the condemnation of private property to subserve its interest. A wagon bridge across a river is held by the Supreme Court of the United States to be so far a public work as to authorize, under the Nebraska statute, the levy of a tax for its construction.[7] And it may safely be added that the right of eminent domain can only be exercised in cases in which the purpose is so manifestly for the public benefit that, under appropriate circumstances, a tax might be levied or county or municipal bonds issued in aid of the enterprise.—[ED. CENT. L. J.

[1] Cole v. City of La Grange, 5 S. C. Rep. 416; St. Louis Co. Ct. v. Griswold, 58 Mo. 175, 193; Agawam v. Hampden, 130 Mass. 528, 534; City of Los Angelos v. Waldron, 3 Pac. Rep. 890.

[2] Lux v. Haggin, 10 Pac. Rep. 674.

[3] Lake Pleasant, etc. Co. v. Contra Costa, etc. Co., 8 Pac. Rep. 501.

[4] Chicago, etc. Co. v. Wiltse, 6 N. E. Rep. 49. See also Chicago, etc. Co. v. Town of Lake, 71 Ill. 333; South Chicago, etc. Co. v. Dix, 109 Ill. 237; Dunlap v. Mount Sterling, 14 Ill. 251; St. Louis, etc. Co. v. Trustees, 43 Ill. 306; Chicago, etc. Co. v. Dunbar, 100 Ill. 129; Smith v. Chicago, etc. Co., 105 Ill. 511; *In re* New York Cent., etc. Co., 77 N. Y. 248; Eldridge v. Smith, 34 Vt. 384; Bradley v. New York, etc. Co., 21 Conn. 305.

[5] Currier v. Marietta, etc. Co., 11 Ohio St. 228; Young v. McKenzie, 3 Ga. 44; Buffalo v. Brainard, 9 N. Y. 103.

[6] Osborne v. County of Adams, 106 U. S. 181; s. c, 1 Sup. Ct. Rep. 168; s. c. (on rehearing), 3 S. C. Rep. 150. See also Township of Burlington v. Beasley, 94 U. S. 310.

[7] United States v. County of Dodge, 3 S. Rep. 590.

TORT—ACTION FOR ASSAULT—EVIDENCE—AGGRAVATION — EXEMPLARY DAMAGES.

ROOT V. STURDEVANT.

Supreme Court of Iowa, October 27, 1886.

1. In a civil action for damages for an assault, the record of the conviction of the defendant for the same assault, upon criminal process, is admissible to prove the fact of the assault.

2. The explanation of the defendant upon pleading "guilty" before the justice is not part of the justice's record nor of the *res gestæ*, and is inadmissible.

3. In such a case matters in aggravation, as of the mode, place, time, or severity of the assault, may be given in evidence by the plaintiff.

4. A jury may be properly instructed that, in addition to compensatory damages, they may, if they find that the defendant was actuated by malice, award to the plaintiff vindictive damages.

Action for damages for assault and battery.

The facts appear sufficiently in the opinion of the court.

REED, J., delivered the opinion of the court:

1. Defendant was prosecuted criminally for the assault and battery charged in the petition. He pleaded guilty, and judgment imposing a fine was entered against him. On the trial of this cause in the district court plaintiff offered in evidence the records of defendant's plea in the criminal case. Defendant objected to the introduction of

the record, on the ground of irrelevancy and incompetency; and on the cross-examination of the justice of the peace, who was sworn for the purpose of identifying the record, he sought to prove an explanatory statement made by him when he entered the plea. His objection to the record was overruled, and on plaintiff's objection the evidence of said statement was excluded. We think these rulings are correct. Defendant's plea of guilty was an admission by him that he had committed the assault and battery charged in the information. That such admission was admissible against him on the trial of this cause cannot be doubted. The entry in the docket of the justice was the judicial record of the plea made at the time it was entered, and was competent evidence to prove the plea. Defendant was not entitled to prove his statement with reference to the transaction made when he entered his plea. The plea was an unqualified admission that he was guilty of the offense charged. No accompanying statement or explanation could change its character in that respect. If there were any circumstances of mitigation in the transaction, his statement at that time, with reference to them, would no more be competent than his statement at other times would have been. The case in this respect does not fall within the rule prescribed by section 3650 of the Code, which provides that "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." The statement in question was no part of the plea of guilty, and was clearly not admissible as explanatory of it.

2. The transaction in question took place in the lower hall of the court house. Plaintiff was permitted, against defendant's objection, to prove that the circuit court was in session at the time, in the court-room, which is in the second story of the building, and that a great number of people from different parts of the country were in the court-room. The parties were entitled to prove all the circumstances surrounding and attending the transaction. The assault was not committed in the immmediate presence of the court, and it does not appear that either the court, or the people in the court-room, were disturbed by it. The fact, however, that it was committed in a public place, and under such circumstances that the officers of the court and the people in the room would soon hear of the transaction, tended to aggravate the offense. An insult or indignity which is suffered in the presence of others is more humiliating than the same wrong would be if perpetrated in private. If it is perpetrated under such circumstances that it must soon become known to many, it may not be as degrading as it would have been if perpetrated in their immediate presence; but it is certainly more so than a like offense committed under circumstances of greater privacy would be. The evidence was properly admitted.

3. The district court instructed the jury, in effect, that if they found for plaintiff they should award him such sum as compensatory damages as they believed, from the evidence, would be a just compensation to him for the physical and mental pain he had suffered in consequence of the assault, and for the insult and indignity he had been subjected to, and the shame and humiliation he had suffered; and that, if the assault was maliciously committed, they might, in addition to the compensatory damages, award a sum as vindictive or punitory damages. And the instructions told the jury that damages of the latter class were awarded by way of punishment for the wrongful act committed, and for the purpose of restraining wrong-doers from a repetition of like wrongs; and that the amount which should be awarded for those purposes was left very largely to their sound discretion. Counsel for appellant takes exception to these instructions. It seems to us, however, that his argument is in the nature of a criticism of the language of the charge, rather than an attempt to refute the real doctrine expressed in it. It may be that the district court used a redundancy of words to express the thoughts intended to be expressed; but, when fairly considered, the instructions expressed no more than is stated above as their effect. The doctrines embodied in them were approved by this court in *Hendrickson v. Hingsburg*, 21 Iowa, 379, and *Ward v. Ward*, 41 Iowa, 686. Affirmed.

NOTE.—This case presents two questions, one of which is so clear that it can hardly be called a question at all. It is manifest that if a defendant in pleading guilty can add to his plea, and make part of the record, statements tending to exculpate him, and which would be admissible in a subsequent proceeding between him and the prosecutor, he can make evidence for himself to an indefinite extent. The ruling of the court that the plea of guilty was a full response to the charge made in the information, and that nothing further was admissible as part of the record in the criminal case is manifestly correct.

The other question relates to the measure of damages. It is well established law that in all actions for torts exemplary damages may be awarded, and to that end matters of aggravation may be given in evidence.[1] "They are given in enhancement * * * of the ordinary damages on acccount of the bad spirit and wrong intention of the defendant.[2] In Illinois, the causes justifying such damages are held to be malice, wilfulness, wantonness or corrupt motives.[3] And there need not be shown actual malice. Such damages may be awarded when there is violence, oppression and wanton recklessness.[4] "Criminal indifference" has been held sufficient cause for such damages.[5] There must be some wrong motive inducing the act complained

1 Hawes v. Knowles, 114 Mass., Mass. 518.

2 Headley v. Watson, 45 Vt. 289; McWilliams v. Bragg, 5 Wis. 424.

3 Clevenger v. Dunaway 84 Ill. 367; Stillwell v. Barrett, 60 Ill. 210; Cutler v. Smith, 57 Ill. 252; Smalley v. Smalley, 81 Ill. 70.

4 Graham v. Pacific R. R. Co., 66 Mo. 536; Raynor v. Nims, 37 Mich. 34.

5 Baltimore, etc. Co. v. Boone, 45 Md. 344.

of.[6] But it has been held in numerous cases that gross negligence will authorize a verdict for exemplary damages.[7] They will not be given, however, when the act complained of was the result of a mutual mistake.[8] Nor will such damages in any case be awarded by a court of equity.[9] And if a plaintiff applies to such a court he waives all claim to exemplary damages.[10]—[ED. CENT. L. J.

[6] Scott v. Bryson, 74 Ind. 420; Becker v. Dupree, 75 Ill. 167.

[7] Taylor v. Grand Trunk, etc. Co., 48 N.H. 304; Memphis, etc. Co. v. Whitfield, 44 Miss. 466; Kalb v. Bankhead, 18 Tex. 228; Byram v. McGuire, 3 Head (Tenn.), 530; Cochran v. Miller 13 Iowa, 128.

[8] Walker v. Fuller, 29 Ark. 448; Jackson v. Schmidt, 14 La Ann. 818.

[9] Sanders v. Anderson, 10 Rich. Eq. (S. C.) 232.

[10] Bird v. W. & M. etc. Co., 8 Rich. Eq. (S. C.) 46.

WEEKLY DIGEST OF RECENT CASES.

1. ASSIGNEE—*Assignee's Allowance of Claims Res Adjudicata — Recovery of Judgment Against Estate no Bar to Right to Dividend.*—1 When the assignee of an insolvent passed upon a claim against the estate and allows it, the question involved therein becomes *res adjudicata*, the decision is final, such judgment having all the force, effect or conclusive attributes of any other judgment. Where, after the assignee has allowed a claim against the estate, the claimant recovers judgment in the courts for the amount of his claim against the estate, and then attempts to collect it by legal process, he is not estopped from demanding his dividend of the assignee. *Eppright v. Kauffman.* S. C., Mo. Nov. 15, 1886.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Actions by Assignees — Fraudulent Mortgages — Laws Wis, 1882, Ch. 170—Fraudulent Transfers—Equitable Remedy.*—An assignee under an assignment for the benefit of creditors cannot bring an action at law to recover the value of goods, the title to which had passed from his assignor prior to the date of his assignment, no matter how fraudulent the transfer may have been. Chapter 170, Laws Wis., 1882, has in no way changed the effect of an assignment for the benefit of creditors under the statute so as to give any title or right of possession to the assignee in property fraudulently transferred by his assignor prior to the date of the assignment to him. The proper remedy of an assignee under an assignment for benefit of creditors for fraudulent transfers, made prior to the date of his assignment, is an action in equity to avoid the same, and subject the property fraudulently transferred, so far as may be necessary, to the execution of the trusts of the assignment, and his rights are limited to that necessity. *Kloeckner v. Bergstrom*, S. C. Wis., Nov. 3, 1886, 30 N. W. Rep. 118.

3. —— *Validity — Accession to Conditions of Deed — Discharge of Claims — Time of Acceptance of Provisions — Surrender of Debts — Closure of Trust — Supervision of Assenting Creditors.*—A deed of assignment for the benefit of creditors of all the debtor's goods not exempt from execution, and containing no directions for the disposition of any surplus after satisfying the creditors who acceded to the terms, but containing the condition that no creditor should participate in the assets unless he will accept his share in full satisfaction of his claims, is vitiated by such a condition. A deed of assignment for the benefit of creditors which specifies no time within which creditors are to accept the provision made for them and surrender their debts, is void. A provision in a deed of assignment for the benefit of creditors that the trust shall be administered and closed up under the supervision of the creditors who assent to it, is fatal to its validity. *Collier v. Davis*, S. C. Ark., Oct. 16, 1886; 1 S. W. 684.

4. CARRIER—*Of Passengers—Injuries to Passenger —Degree of Care and Skill—Negligence—Several Injuries— One Not Caused by Accident — Instructions.*—In an action for damages against a railway company for injuries received while riding in one of its cars, an instruction to the jury that the company must show that it used all reasonably practical care and precaution to prevent the injury, is erroneous. A carrier is bound to exercise the highest degree of care and skill to preserve the safety of its passengers. Where, in an action for damages against a railway company, the plaintiff alleged several specified injuries, and the court instructed the jury to the effect that, if they found that one specified injury was not caused or aggravated by the accident, then they should find for the defendant, *held* an erroneous instruction, although in other instructions the jury were told that if they found for the plaintiff they should award damages sufficient to compensate him for all the injuries received. *Moore v. Des Moines, etc. Co.*, S. C. Iowa, Oct. 11, 1886; 30 N. W. Rep. 51.

5. —— —— *Luggage — Agent — Negligence — Contributory — Crossing Trestle with Muddy Feet.* — Where a passenger attempts to board a passenger car with a gun, and, on being directed to place the gun in the baggage car, delivers it to a person there, who demands and receives 25 cents for the service, the passenger may recover damages for the carriage of the gun beyond his destination, though the person to whom the gun was actually delivered might have been the agent of an express company. A passenger who was carried beyond his station, and put off at one end of the trestle, his gun, which he had placed as directed in the baggage car, being put off at the other end, cannot recover damages for personal injuries received by him by falling on the trestle while crossing with his gun, which he had gone to get, when he attempted to make the passage back

with muddy and slippery feet. *International, etc. Co. v. Folliard*, S. Ct. Texas, Oct. 22, 1886; 1 S. W. Rep. 624.

6. COMMERCIAL LAW—*Bill of Exchange—Acceptance by Agent of Corporation.*—The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described in the bills as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it. *Robinson v. Kanawha, etc. Bk.*, S. C. Ohio, Oct. 19, 1886; 8 N. E. Rep. 583.

7. CONTRACT—*Executory Sale—Use of Material in Specified Place—Rescission.*—Where the owners of a tract of land, who are also interested in a tannery, enter into a contract with the firm owning the tannery for the sale of all the bark growing upon the tract of land, the bark to be used in the tannery in carrying on the same to be paid for before removal from the land, and to remain the property of the vendors until paid for, the provision in the contract in regard to the use of the bark in the tannery is not such a condition or limitation as will entitle the vendors to insist upon the use of the bark within the tannery alone, and to rescind or terminate the contract, in the event of its destruction by fire. *Lyon v. Hersey*, N. Y. Ct. App., Oct. 5, 1886; 8 N. E. Rep. 516.

8. ——— *Restraint of Trade—Contract Divisible and Reasonable.*—A, by a contract, for a valuable consideration, agreed with B that he would not hereafter engage in the business of manufacturing ocher "in the county of Lehigh or elsewhere." He subsequently went into the business of manufacturing ocher in Lehigh county, and upon a bill for injunction to restrain him from continuing the same being filed by B, he answered that his contract was in restraint of trade, and therefore contrary to public policy. *Held*, that the contract was divisible as to place; that, while it was void outside of Lehigh county, it was good within the county; that it was competent for A to make the contract; and that it was reasonable and not oppressive. *Smith's Appeal*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 251.

9. CORPORATION—*Municipal Corporations—Damages from Surface Water, Etc.*—A person who has occupied and improved property outside of a city has a right to be reimbursed in damages, where the city has subsequently extended its limits, and, in grading a street made necessary by such extension, has knocked down his fences, and caused surface water to overflow his property, and injure his cellar, walls, and shrubbery. *Gray v. Knoxville*, S. C. Tenn., Sept. 1886; 1 S. W. Rep. 622.

10. COVENANT—*Deed—Covenant of Warranty—Covenant Against Incumbrances—Effect of Exception—Restriction in One Covenant Affecting Another — Estoppel — By Matter of Record — Judgment — Subsequent Appeal.* — The fact that, in a deed with full covenants of warranty, the covenant against incumbrances contains an exception of an existing mortgage, will not bar the grantee from interposing any defense to the mortgage that the mortgageor might have interposed. A restriction in one covenant of a deed has by reason of that fact, no effect on an independent covenant in the same deed. Questions determined on a former appeal will not be re-examined on a subsequent one. *Bennett v. Keehan*, S. C. Wis., Nov. 3, 1886; 30 N. W. Rep. 112.

11. ——— *Warranty—Pleading—Necessary Averments of Complaint—Effect of Judgment and Eviction—Evidence—Parol Testimony to Show Consideration of Deed—Assumption by Purchaser of Widow's Outstanding Estate—Deed—Acknowledgment Necessary for Record, but Not as Between Parties—Pleading—Filing Cross-Complaint After Issues Closed—Discretion of Trial Judge.*—A complaint in an action for breach of covenants of warranty need not aver that the covenantor was required to defend; it is sufficient if it shows a judgment and an eviction under it. Where an action to recover possession of land is brought by one claiming to be the owner, and the grantee duly notifies his grantor of the fact, the latter will be bound by the judgment in which the action results; and where the grantor does not appear and defend, the grantee, after judgment rendered, may yield possession without taking an appeal. Under the statutes of Indiana the interest of a wife in her husband's lands is more than an incumbrance; it is an estate in the land itself. In an action for breach of covenant of warranty the grantor cannot introduce parol evidence to show that a deed with full covenants of warranty was taken by the grantee with the knowledge of a widow's outstanding rights in the land conveyed, and that the grantee assumed and agreed to pay off the "incumbrance" created by her estate. An acknowledgment is essential to entitle a deed to go upon record, but it is not essential to give effect to the deed as between the parties. After the issues are closed, and the cause set for trial, permission to file a cross-complaint is in the sound discretion of the trial court, and an order refusing permission to do so will not be set aside, unless it is shown that that discretion has been abused. *Bever v. North*, S. C. Ind., October 5, 1886; 8 N. E. Rep. 576.

12. CRIMINAL LAW—*Defendant's Presence—Sheriff Disqualified, Coroner Must Summon the Jury—When—Defendant Absent when Jury Impannelled—Out on Bail—Defendant to be Present at Each Step, Except Voluntarily Absent at Time of Receiving Verdict.*—When the sheriff of the county is disqualified from acting in summoning the jury by reason of his prejudice against defendant, the court errs in selecting another person, other than the coroner, to summon the jury, where it is not suggested that the latter is disqualified. Upon a trial for a felony, it is error to permit the jury to be selected in absence of defendant, although his counsel was present, and although the defendant was voluntarily absent, being out on bail, and although when the trial was called the court gave defendant an opportunity to further examine the jurors. Under § 1891, R. S. Mo., in all cases of felony, it is necessary that the defendant should be personally present in court at each and every material step taken during the trial, up to the time the verdict is to be received, when the verdict may be received and entered in his absence if it is willful and voluntary. *State v. Crockett*, S. C. Mo., Nov. 15, 1886.

13. ——— ——— *Indictment -- Number of Case—Nuisance — Duplicity — Negativing Exceptions—Trial—Evidence—Limiting Number of Witnesses --New Trial—Misconduct of Juror—Presumption — Knowledge of Party — Failure of City to Provide Drainage.*—When the record shows that an indictment was returned by the grand jury, and the proceedings appear to be founded on such indictment, it is immaterial that the number of the case as stated on the indictment is different from that stated elsewhere in the record. An indictment which charges that the accused create a nuisance by doing all of the acts prohibited by the single section of the statute defining a nuisance is not bad for duplicity. An indictment for creating a nuisance is not bad for failing to aver that the acts done by the accused were not authorized by a city ordinance passed under the proviso in section 2066, Rev. St. Ind. Where it is not shown what facts a question propounded to a witness is expected to elicit, no available error is committed in refusing to permit the question to be answered. A reasonable limitation of witnesses is within the discretion of the court, and a limitation to seven is not an abuse of discretion in a prosecution for nuisance, in a case where the court gives notice in advance of the limitation. Where a new trial is sought upon the ground of misconduct on the part of a juror, it must be made to affirmatively appear that there was actual misconduct, and that it was not known to the party until after verdict. It is no defense to a prosecution for creating a nuisance by discharging offensive substance into an artificial water-course, that a municipal corporation has failed to provide adequate drainage. *Mergentheim v. State*, S. C. Ind. Oct. 7, 1886; 8 N. E. Rep. 568.

14. ——— ———. *Obtaining Money by Cheat — Form of Indictment under § 1561, R. S. 1879 of Mo.—Common Law Form—Where Names of Victims Unknown.* — Under the provisions of § 1561, R. S. 1879, of Missouri, an indictment is not in sufficient form, if it fails to state the name of the person or corporation upon whom the fraud was committed in obtaining, etc., the money or property by means and use of cheat, or where it does not aver that the name or names of such person or persons are not given because they are unknown to the grand jury, but only avers that a more particular description of said persons, firms, and corporations is unknown. Thus, where the indictment charges that the defendant did obtain by means of a trick, etc., money or property "from certain persons, firms and corporations then and there composing a voluntary association, known as the 'Brewers' Association of St. Louis and East St. Louis,' a more particular description of which said persons, firms and corporations and of said association, is to the jurors unknown," it does not comply with the statutory form and is insufficient. State v. Fansher, 71 Mo. 461; Morton v. People, 47 Ill. 468. Under the ruling of State v. Fansher. 71 Mo. 361, where the name of the person or persons from whom money or property is sought to be obtained by the device named in the statute is unknown, the statutory form cannot be resorted to in preferring the indictment, but it must be drawn according to the rules of the common law. Under the principles of the common law, the indictment must set forth with particularity "the trick or deception or false or fraudulent representations," etc., as well as the name of the person sought to be defrauded, if known, and if unknown to the grand jury that fact should be averred as a reason for not setting it forth. In such case the accused would be informed sufficiently of the cause and nature of the accusation, by the particular description of the trick, device or false pretense contained in the indictment. *State v. McChesney*, S. C. Mo. Nov. 15, 1886;

15. DOWER— *Assignment — Distributive Share — Creditors' Petition to Set Aside.* — Whether a court of equity would, at the instance of a creditor of a widow, cause her distributive share in her husband's estate, under the Iowa Code, to be set aside, so that an execution could be levied upon it, *quære;* but, in any event, the petition in such an action should show that the real estate sought to be distributed is all the real estate of which the husband died seized, and the court must have before it all the parties in interest. *Getchell v. McGuire*, S. C. Iowa, Oct. 27, 1886; 30 N. W. Rep. 7.

16. ESTOPPEL— *Statements to Third Party — Subsequent Employment by Defendant.*—In an action to recover the amount of a bond and mortgage, statements by the plaintiff to a third party, not made to be communicated to the defendant, to the effect that a certain party was authorized to act as her agent, do not, in a question with the defendant, estop the plaintiff from denying the authority of such alleged agent, even though the person to whom the statements were made came into the defendant's employ afterwards. *MaGuire v. Selden*, N. Y. Ct. Appls, Oct. 5, 1886; 8 N E. Rep. 515.

17. FRAUDULENT CONVEYANCES — *Husband and Wife—Part Payment by Husband — Creditor's Claim Paid Out of the Property.* — Property bought and put in a wife's name should not be subjected to the claim of creditors of the husband, on the ground that it was partly paid for by the husband, there being no actual, as distinguished from constructive, fraud, if money was afterwards raised by mortgage on the property, and as much of the creditors' claim as was owing when the property was bought was paid therefrom; especially if part of the money paid by the husband on the purchase price went to one of the firm of creditors seeking to subject the property. *McChord v. Noe*, Ky. Ct. Appls., Oct. 19, 1886; 1 S. W. Rep. 644.

18. INJUNCTION — *Damages — Party Enjoined in Contempt by Disregarding Injunction—Rights of Innocent Stockholder.*—Where an injunction has been granted against the treasurer of a corporation, restraining him from collecting any royalties or dividends of stock due the corporation, and such royalties and dividends are afterwards paid into its treasury, the treasurer and corporation are alike guilty of contempt, and upon a dissolution of the injunction are not entitled to recover damages for detention of the fund. Where a corporation has been restrained by injunction from collecting the dividends due to its stockholders, and the injunction is afterwards dissolved, the stockholders may recover simple interest thereon from the time the dividends were declared, pending the injunction, up to the period of the dissolution thereof. *Heck v. Bulkley*, S. C. Tenn., Sept. 21, 1886.

19. JUDGMENT—*Revival—Presumption of Payment —Burden of Proof—Jurisdiction of County Court*

Where Transcript has been Filed in District Court.—In a proceeding to revive a judgment in the county court, where the judgment debtor, on an order to show cause why the judgment shall not be revived, for such cause shows, by affidavit, that the judgment has been paid and satisfied, it is error for the county court to render final order of revivor without hearing testimony as to such payment or satisfaction. There being a presumption in favor of such payment and satisfaction, the burden and proof is on the judgment plaintiff to show that the judgment is unsatisfied. When the transcript of a judgment rendered in a county court is filed in the district court of the same county, all proceedings should thereafter be had in such district court; but, in the absence of a statute prohibiting the court in which the judgment was rendered from proceeding further in the case, a judgment of revivor rendered in such court will be valid. The county court possessing such jurisdiction, it is not error to exercise it. *Garrison v. Aultman*, S. C. Neb., Nov. 4, 1886; 30 N. W. Rep. 61.

20. LANDLORD AND TENANT—*Lease—Construction—Steam Furnished by Landlord.*—A demised to B certain premises known as the fonndry building yard space for necessary stock and materials, the joint use of a pattern-shop, and the engine-room adjoining the foundry, for the annual rent of $500. It was further provided by the lease that B "shall pay fifteen cents per hour for the steam furnished to his engine" by A, "and he shall have the right to use the tools in the pattern-shop; but, in consideration therefor," A "shall have the use without charge of the power of the engine" of A whenever required in the pattern-shop. *Held*, that this was not a covenant on the part of A that he would furnish the steam necessary to carry on the business of B, nor that B should take any steam. *Penn Iron Co. v. Diller*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 272.

21. *Rent—Joint Tenants—Amendment—Liability of Landlord for Failure to Repair—Custom.*—One joint tenant of real estate can not maintain in his own name an action for rent of premises leased in the name of both; but after a plea in abatement for non-joinder, a justice's court may make the other joint tenant a party to the suit, and permit the case to proceed to judgment on its merits. A landlord is not bound to repair, unless there is a covenant or agreement on his part to do so, and in an action for rent a tenant cannot recover for damnges to his goods caused by a leaky roof, of which the landlord had notice; nor is it admissible, in such an action, to show a general custom of the place for landlords to repair. *Weinstein v. Harrison*, S. C. Texas, Oct. 26, 1886; 1 S. W. Rep., 626.

22. LEGACIES—*Decree—Action—Pleading—Debts, Charges and Expenses—Action at Law—Statute.*—In an action against an executor to recover a legacy on the decree of the probate court, where the statute provides that after the payment of debts, funeral charges, and expenses of administration, the legatees shall be ascertained and their gifts fixed, the complaint need not allege the payment of these debts, charges and expenses. In an action against an executor to recover a legacy, it need not be alleged that the legacy is in the possession of the executor. An action at law against an executor to recover the amount of a legacy, can be maintained without the aid of a statute. *Weeks v. Sowles*, S. C. Vt., Sept. 8, 1886; 22 Reporter, 639.

23. LESSOR AND LESSEE—*Renewal Lease—Waste.*—A court of equity will interfere to restrain a tenant holding under a perpetual renewable lease from removing buildings on the leased premises when it appears that such removal would greatly impair and endanger the security for the rent reserved, so long, however, as the rent reserved is not rendered insecure by the acts of the tenant holding under such a lease, his right to manage the property in his own way cannot be interfered with. *Crowe v. Wilson*, Md. Ct. Appls., June 23, 1886; 7 East. Rep. 314.

24. MORTGAGE—*Future Advances—Validity—Bill to Redeem—Interest—Payment for Services—Demand.*—A mortgage given to the defendant to secure him for advances which he had made, and which he might make thereafter, for the benefit of the mortgageor in the settlement of the latter's affairs, and for the services rendered by the defendant in such settlement, is valid, though first given to a person for the benefit of the defendant, and afterwards assigned to the latter; and upon a bill brought to redeem, by the holder of a second mortgage on the same property, who took with knowledge of the origin and character of the first mortgage, the latter, before he can redeem, must pay the debt intended to be secured by the first mortgage. One who holds a mortgage to secure payment for services rendered to the mortgageor cannot recover interest on the sum due for services, for which no demand of payment has been made. Upon a bill brought by the holder of a second mortgage, where it appears that the defendant held the first mortgage to secure him against liability upon an indenture, the purposes of which have been fully executed, the latter will not be permitted to continue to hold the mortgage as security for an alleged liability which does not exist. *Taft v. Stoddard*, S. J. Ct. Mass., Oct. 22, 1886; 8 N. E. Rep. 586.

25. ——*Priorities—Promissory Notes—Interest—Foreclosure—Sale—Civil Code Ky.*—W executed his note to J for money borrowed, payable in a limited time, with interest from maturity at 8 per cent. per annum. At the time he executed to her six other notes, with F & B as sureties, for a certain sum each, which became due, respectively, during the time, as semi-annul installments of interest. W, to secure the payment of seven notes, executed to her a mortgage on land, in which it was stipulated that, if F & B were compelled to pay any of the interest notes, they were to be substituted to her rights, but subject to her superior lien. Afterwards, W borrowed of F & B a sum of money, for which he gave his note, bearing a certain rate of interest until paid, and payable in a given time, and to secure the payment of this note he executed to them a mortgage on the same land. F & B also paid to J for W the interest notes. Subsequent to this loan by F & B to W, and at the maturity of the principal note, J agreed with W in writing to extend the time of payment of the notes three years further, and to reduce the rate of interest payable thereon to 7½ per cent. In proceedings to foreclose the mortgages, *held*, that no part of the proceeds of the property should be applied to pay interest on the semi-annual installments of interest on the principal debt in favor of J until the debts of F & B were satisfied. Where, in an action to foreclose a

mortgage, the sum of money to be raised amounts to upwards of $20,000, and the court directs that $2,000 of this amount shall be paid in cash, and the balance in six and twelve months, a sale on these terms is not a sale on reasonable credit, within the meaning of Civil Code Ky. *Willett v. Johnson*, Ky. Ct. Appls, Nov. 6, 1886; 1 S. W. Rep. 674.

26. NEGLIGENCE.—*Proximate Cause—Defects not Causing Injury — Railroads.* — Plaintiff, in uncoupling defendant's cars, caught his foot in a brake-beam. He signaled the engineer, but his signal was not at once seen. When perceived, the engine was reversed, and the train stopped immediately, but too late to prevent injury to plaintiff. The engine was defective, and hard to reverse, which is plaintiff's ground of action. *Held*, that the defect in the engine was not the cause of the injury, and defendant was not liable. *Bajuse v. Syracuse, etc. Co.*, N. Y. Ct. Appls., Oct. 12, 1886; 8 N. E. Rep. 529.

27. NUISANCE — *Railroad Company — Engine-House Next to Dwelling — Justification Under Legislative Authority—Legislative Sanction Not Inferred.*—The erection by a railroad company of an engine-house and coal-bins in the city of New York, on a lot adjoining property used as a residence, and their maintenance in such a manner as to render such property unhealthy and unfit for a residence, and to depreciate it in value, creates a private nuisance for which, as between individuals, an action would lie for damages, and for which a court of equity would grant a remedy by injunction; and the company cannot, in such proceedings, justify under an act of the legislature giving the company a right which they had not had at the time of the erection of such engine-house, to enter the city on the tracks of another railroad "on such terms, and to such point, as might be agreed upon between the companies." A statutory sanction cannot be pleaded in justification of acts which by the general rules of law, constitute a nuisance to private property, unless they are expressly authorized by the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred. *Cogswell v. New York, etc. Co.*, N. Y., Ct. Appls., Oct. 5, 1886; 8 N. E. Rep. 537.

28. PARTNERSHIP—*Dissolution—Parol Proof of What Figures, Used as Basis for Dissolution Mean — Estoppel — Evidence — Settlement — Set-Off and Counter-Claim — Depreciation in Stocks Taken by One Partner — Interest — Mistake — Demand— Costs — Appeal — Unnecessary Abstract — Printing.*—In an action by one partner to recover a balance due him by the other on a settlement and division between them when the partnership was dissolved, the plaintiff may be asked if there was anything in certain figures which had been made between the parties at the time of the dissolution intended to show the difference in value between the property he got and the property the defendant got on the division; it not appearing from the figures themselves what they were intended for. When partners who are about to dissolve partnership agrees as to how the figures should be ascertained, or the value of the firm property determined, and the course agreed upon is pursued, and the property divided on that basis, one partner cannot, in a subsequent suit by the other for a balance due him under the settlement, set up the fact that the property transferred by him to the other did not amount to as much as he supposed it would. One partner who, at a settlement on a dissolution of the partnership, transfers to the other certain stock of two manufacturing corporations, in which both partners were interested, the stock being then at par, is not liable to have set-off against a judgment subsequently recovered by him against the other partner for a sum due him on the settlement, but omitted by mistake, a depreciation in the stock of one of the companies, caused by the failure to collect a note executed to it by the other corporation subsequent to the settlement, although at the time the transfer was made the partner making it agreed to pay the other a certain proportion of the accounts of such company as should prove uncollectible. The fact that, upon a dissolution of partnership, it was agreed between the partners that each should give the other demand notes, without interest, for the balances found due between them, does not deprive one partner, who subsequently recovers a judgment against the other, for a sum not paid him on the settlement by mistake, of interest on his claim; and interest runs, not from the discovery of the mistake and demand, but from the date of settlement. An abstract setting out, among other things, what is called the decision of the court below, showing detailed findings of facts, and the opinion of the court thereon, is not properly a part of the record, and the costs of printing should be taxed to the appellee, who filed it. *Donahue v. McCosh*, S. C. Iowa, Oct., 27, 1886; 30 N. W. Rep. 14.

29. PAYMENT—*Presumption—Possession of Note and Contract.*—Plaintiff sold a piano to defendant on a contract, taking her promissory notes for the unpaid purchase price, stipulating that the title was to remain in him until the notes were paid. The defendant's husband obtained the notes and contract from the attorney who held them for collection, and delivered them to his wife, informing her he had paid them, and receiving in consideration the release of a debt he owed her. The plaintiff, not having received the proceeds of the notes, brought this action of replevin. *Held*, the production of the notes and contract by the defendant raised the presumption of their release and discharge according to their tenor, and was a good defense; and proof that they were received from the attorney, and the proceeds not received by plaintiff, did not rebut the presumption or amount to proof of non-payment. *Hollenburg v. Lane*, S. C. Ark., Oct. 23, 1886; 1 S. W. Rep. 687.

30. REPLEVIN—*Damages—Suit on Bond—How St. Mich. § 8375.* — Where the plaintiff fails, after replevying and obtaining the property—beasts which had been impounded for destroying defendant's corn—the defendant may have an assessment covering every claim arising out of the distress and damages done him by the beasts. The defendant is not restricted to his suit on the bond for assessment of damages. *Sterner v. Hodgson*, S. C. Mich., Oct., 28, 1886; 30 N. W. Rep. 77.

31. —— *Goods Sold—Authority of Purchaser's Agent—Verdict—Objection to Evidence—Waiver —Motion for Verdict.*—In an action of replevin to recover property seized under an attachment,

where the defendants, having pleaded a general denial, rely upon an alleged sale and delivery thereunder to defeat the plaintiff's claim, and there is evidence tending to show that the agent of the vendee by whom the alleged purchase was made had no authority to make such a contract, it is not error for the court to overrule a motion by the defendants to direct the jury to return a verdict for them, and, if the defendants elect to stand upon their motion, to direct the jury to return a verdict for the plaintiff. Where the court overrules a motion by the defendants to direct the jury to return a verdict for them, and the defendants elect to stand upon their motion, they thereby waive any errors in the admission of evidence that had previously occurred. *Battis v. McCord*, S. C. Iowa, Oct. 26, 1886; 30 N. W. Rep. 11.

32. SALE—*Bona Fide Purchaser—Conditional Sale—Notice — Possession.*— Where the vendee takes possession under a conditional sale, in which the title remains in the vendor until payment, and mortgages the goods to one ignorant of the condition and of the right of the vendor, and the vendor is never paid, the possession gives no right to pass title, the vendor is not estopped from asserting title, and the mortgagee gets no title which he can assert against the vendor. *McIntosh v. Hill*, S. C. Ark., Oct. 16, 1886; 1 S. W. Rep. 680.

33. —— *Reaping Machine—Delivery in Parts—Rescission—Delay in Delivery.*—Under a contract for the purchase of a reaping machine, the delivery will not be complete until the different parts, which none but an expert can put together, have been set up so as to form a machine. Where the testimony for the defendant tended to show that he purchased a reaping machine, with the understanding that it should be delivered to him, fit for use, on or before a certain day, when it was necessary for him to begin his harvest, and the machine was only delivered in parts, boxed up, on that day, the vendor's expert not offering to set it up until three days later, the defendant's right to refuse the machine should go to the jury upon the theory presented by him. *Wood Mowing-Machine Co. v. Gaertner*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 106.

34. SETTLEMENT — *Descent — Wife's Property—Claim of Next of Kin—Agreement Between Husband and Wife.*—Where husband and wife, natives of Germany, by their equal labor and thrift accumulated property in real estate, and the husband deeds it to his wife, and, on her death, never having had children, her lands go to her next of kin, who live in Germsny, and who, upon demanding the lands of the husband, are met by his statement that there was an agreement between him and his wife that the property should go to the survivor of them, to be by said survivor devised equally among the relatives of each, and the parties finally settled by mutually deeding a moiety to each other, this settlement, in the absence of any overreaching by the husband, will be upheld as eminently fair and equitable. *Seive v. Steinreide*, Ky. Ct. Appls., Oct. 30, 1886; 1 S. W. Rep. 672.

35. —— *Evidence—Deed — Consideration—Promissory Note.*—Where, in an action on a promissory note, defendant pleads that it was without consideration, as given for an alleged balance of old transactions, which included two notes actually paid in a settlement, in which a farm was deeded to plaintiff in full liquidation of all debts, leaving a balance coming to defendant of any excess obtained on sale, it is competent for defendants to introduce the deed in evidence, not as conclusive proof of the consideration for the farm, but as an element of the settlement relied upon in determining the question whether the notes which were the consideration of the note sued on were included in the settlement made when the deed was given. *Duflo v. Juif*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 105.

36. SURETY—*Principal and Surety—Liability of Surety — Receiver — Settlement of Partnership Affairs.*—In an action for a settlement of partnership affairs and the appointment of a receiver, the defendant was allowed by the court to remain in possession, on giving his bond, with a surety, to "abide by the future orders of the district court in the case." *Held*, that such bond will hold the surety for the amount of the final order of settlement, and his liability under it will not be restricted to the duties of the defendant as receiver merely. *Stull v. Lee*, S. C. Iowa, Oct. 25, 1886; 30 N. W. Rep. 6.

37. TRESPASS — *When may be Maintained—Vendor and Vendee — Timber — License.* — A agreed in writing to sell to B the timber standing on certain land, and provided that the same should be cut and removed in two years. Afterwards he agreed verbally with B to extend the time for cutting and removing the same, but before the time had expired A made a sale of the land to C, who had actual notice of the the parol agreement with B, and who forbid his cutting any more of the timber. In an action of trespass on the case, brought by B against C for the value of the timber, *held*, that the agreement for extension was a license to B, which C had a right to revoke; that B had a right only to remove the timber which he had cut until forbidden by C to cut any more; and that he could maintain no action against C for the value of the standing timber. *Williams v. Flood*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 93.

38. WILLS—*Construction—Contingent Remainder—Distribution Based on Contingency.*—A testator having provided in his will: "If, at my death, there shall be any surplus stock or personal property, or any cash or cash notes, on hands, it is my will and desire that the stock and personal property may be sold, the money collected and loaned out during the life of my wife, and, at her death, I desire that it may be divided between my said daughter and granddaughter:" *Held*, that the words created a contingent estate, dependent upon the death of the wife, in the daughter and granddaughter, both as to the principal and interest of the "money collected and loaned out" after the sale mentioned. When the gift is created simply by directing the payment or distribution of the legacy at some future period of time after the decease of the testator, or upon the happening of a contingent event, and there is no provision in the will for vesting the legacy immediately, then the future time fixed, or the happening of the contingency, is of the essence of the gift. *Willett v. Rutter*, Ky. Ct. Appls., Oct. 5, 1886; 1 S. W. Rep. 640.

39. WITNESS—*Discrediting—Refusal to Answer—Interrogation as to Crime.*—Where the issue is whether notes have been paid, the refusal of the former clerk of plaintiffs, on being examined as to business transactions concerning the notes in suit, to answer interrogatories as to whether he had embezzled the funds of plaintiffs, falsified their books to cover his embezzlement, and used one of the notes, which was a renewal of the original note, for that purpose, cannot go to the jury to discredit the witness; the issue not being his embezzlement. *Slocum v. Knosby*, S. C. Iowa, Oct. 27, 1886; 30 N. W. Rep. 18.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

Query 32. A sells to B, at public sale, a pure bred Hereford cow, and states that she is in calf by a certain famous Hereford bull, owned by A. In order to get a representative from such a noted sire, B bids to $1,000, and gets the cow. The calf comes in due season, and proves to be a male. B uses this calf as a yearling, breeding him to some twenty or thirty cows, among them a number of pure bred cows. The distinctive outward features of the Hereford cattle are a white face, red body and quite prominent horns, and the exception to this rule is very scarce. When the calves come that are sired by this yearling, they prove to be of all colors—red, white, black, yellow, etc., some horned and some hornless, and this out of pure bred Hereford cows, as well as out of ordinary cows. These same cows, to a different Hereford sire, brought calves properly marked. A insists that the pedigree of the young sire is all right, and declines to take any steps in the matter, claiming that he could not be held responsible for the second generation from animals sold by him. B claims, however, that he paid a high price for the cow in the hope of getting a male, and having him hand down in his turn the distinctive features of the Hereford cattle, and that the failure to do so is a damage that A should make good. In other words, A sells B a cow in calf for breeding purposes in a Hereford herd. The calf breeds all right, except his calves lack the color and formation of Herefords, as established in their herd book, and consequently are of but little more value than common stock. Who should stand the loss? ARBITRATOR.

RECENT PUBLICATIONS.

OHIO CORPORATIONS, other than Municipal, as Authorized by the Old and New Constitutions, and Regulated by Statute, with Notes of Decisions, and a Complete Manual of Forms for Organizing and Managing all Kinds of Companies and Associations. By A. T. Brewer and G. A. Laubscher of the Cleveland Bar. Second Edition, enlarged. Cincinnati: Robert Clark & Co., 1886.

This is a local book which seems to have been favorably received by the profession in its appropriate *habitat*, and from the examination which we have given it, deserves well of the lawyers of Ohio, and all other lawyers who may have any professional connection with the corporation law of that State.

That such a compilation cannot fail to be highly useful is abundantly clear from the consideration, that of late years nearly every variety of useful and profitable enterprises is prosecuted by corporations which in fact, are fast absorbing, in one form or another, all the business of the country, except such as from its very nature is incapable of aggregation and co-operation. In every State, therefore, there should be a judicious and carefully prepared system of corporation law, and it is equally important that it should be given to the profession and the public in as complete a form as possible, well arranged and carefully annotated. This has been very well done in the work before us, and we have no doubt that the second edition will be received with increased favor by the profession in Ohio.

JETSAM AND FLOTSAM.

PATTERN CROSS-EXAMINERS — THE CORKSCREW PATTERN. — This great cross-examiner, like a few other great men, proceeds upon a theory. He has observed that the situation of truth, in modern times at least, is best described, not as at the bottom of a well, but rather as in a tightly corked bottle. He regards a witness much as he does a bottle of Appolinaris water; and the object of cross-examination is to get the cork out. The art of doing this is to do it without an explosion and waste of the contents.

Since he discovered this principle he rarely has any difficulty with the process of cross-examining. He appreciates the importance of not shaking the bottle before the cork is drawn. So he disarms the witness entirely. His suave and plausible manner puts the witness at his ease. You would think they were great friends; or that he was ingratiating himself with a great man or an admired woman preparatory to asking some considerable favor.

He believes in a good long course of introductory questions to be continued until he finds the stream of testimony running freely. So he takes whatever comes.

From the reserved or taciturn witness he accepts short answers, and follows graciously with a question just enough different from the one unsatisfactorily answered to invite a better answer. From the voluble witness he allows long answers, hoping in this way to get at the bottom of it.

But as soon as he has got the first flow fairly going he claps in the cork again with an objection—Wait a minute; one thing at a time; then he rummages with his papers as if in search of something else, or confers with his associate, as if he had no desire to stop his friend the witness, but only wished to prepare to understand him.

From this time on his task consists in alternately uncorking the witness and corking him up again. Each of these meddling processes he accomplishes with the utmost urbanity; and sometimes, almost at the same instant, so that only a single gurgle of testimony may escape between two interrogatories and the witness hardly knows whether he has said anything or not.

In this our friend, the cross-examiner, prides himself, particularly in the art of "getting it out of the fellow;" but it must be admitted that he often gets out just what he doesn't want to. Spectators in the profession are more inclined to admire his tact in "stopping it in," which he generally succeeds in doing.—*N. Y. Daily Register.*